

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED OCT 19 1957

No. 13,904

Joseph W. Stewart
CLERK

JOSEPH C. BECHTOLD,

Appellant,

VS.

ROBERT C. WATSON, Commissioner of Patents,

Appellee.

Appeal from a Judgment Rendered by the District Court
of the United States for the District of Columbia

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QUESTIONS PRESENTED

1. Whether the claimed fitting which we will call a Hi-Top Tee, involves a material variation from the disclosures of the patents to Kimche, No. 853,413, and Bouldin No. 2,499,900 (Appellant's App. 21, 25)?

2. Whether the differences between the claimed fitting and the prior art as represented by the said patents to Kimche and Bouldin are such as would have been obvious at the time the invention was made to a person having ordinary skill in the art?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,904

JOSEPH C. BECHTOLD,

Appellant,

vs.

ROBERT C. WATSON, Commissioner of Patents,

Appellee.

Appeal from a Judgment Rendered by the District Court
of the United States for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is a civil action to obtain a patent, brought under the provisions of 35 U. S. C. 145. From the adverse decision of the lower tribunal, this court has jurisdiction to review the judgment.

STATEMENT OF THE CASE

On November 23, 1951, Joseph C. Bechtold filed application for patent Serial No. 257,819, for a Soil Plumbing

Fitting. After refusal of a patent on such application by the Patent Office, a civil action to obtain the patent was filed in the United States District Court for the District of Columbia, involving claims 1 through 4 (Appellant's App. 2, 3). The District Court refused to authorize the allowance of such claims on the ground that all the appellant did was to change the size or repropotion the parts of the plumbing fittings disclosed by the patents to Kimche No. 853,413 and Bouldin No. 2,499,900 (Appellant's App. 21, 25). This was error.

STATUTE INVOLVED

35 U. S. C., 103. "S. 103. Conditions for patentability: non-obvious subject matter.

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

STATEMENT OF POINTS

Point I. The District Court Erred In Holding That All The Appellant Did Was To Reproportion The Parts Or Change The Size Of The Kimche Or Bouldin Fitting.

Point II. The Appellant's Article Of Manufacture Involves Something More Than A Mere Change In Size Of The Fitting Disclosed By The References Relied Upon.

Point III. The Appellant's Fitting Involves Something More That Reproportioning The Parts Of The Kimche And Bouldin Devices.

Point IV. The Lower Court Did Not Decide The Case On The Applicable Principles Of Law Involved Except, Possibly, By Inference.

Point V. The Lower Tribunal Could Not Find That What The Appellant Did Was Obvious To A Person Skilled In The Art Without Discrediting The Testimony Of All The Witnesses.

SUMMARY OF ARGUMENT

The decision in this case must be based on 35 U. S. C., 103 (p. , this brief).

The sole question is whether by making a pipe length integral with a particular part of a standard plumbing tee fitting to fabricate a Hi-Top Tee would have been obvious at the time the invention was made to the average man familiar with such matters—not to one possessed with hindsight knowledge. Such man is conclusively presumed to be familiar with all of the prior art as exemplified by the patents to Kimche No. 853,413, and Bouldin No. 2,499,900.

The principle of law involved, and the only principle, centers around the matter of obviousness in unifying divided parts. In its opinion (Appellant's App. 5), the lower tribunal missed the point entirely and apparently ignored the appellant's trial memorandum on the subject (Appellant's App. 9). Such court stated that it was not called upon to decide that question and based its decision on a false premise. It opined that all the appellant did was to reportion the parts or change the size of the articles of manufacture disclosed by the patents mentioned, and this was error because—

1. The Court was mislead by appearances. The patents relied upon do not disclose tee fittings and neither could be used for the appellant's purpose or solve the problem which the appellant solved.

2. In patent law, when one speaks of change of proportions, changes in proportions of chemical compounds and metal alloys is meant. Similarly,—

3. The matter of change of size presupposes no material change except as to size, like a number 6 shoe and a number 10 shoe.

4. No matter how the parts of the prior art references are proportioned or what their sizes, the appellant's Hi-Top Tee would not result. The lower tribunal erred in holding that it would and, at the same time, refused to apply the applicable rule relating to unification of parts as announced in *Krementz v. Cottle Co.*, 148 U. S. 556, 558, 37 L. Ed. 558, and *McMichael v. Stafford*, 105 F. 380, 382.

5. The prompt and wide acceptance by the trade of appellant's Hi-Top Tee is in itself proof that its production was no obvious to those skilled in the art.

ARGUMENT

The determination of the question of patentability of a claimed invention over prior art references necessitates a clear understanding of exactly what the claimed invention is and what the prior art actually shows. Therefore, we will describe the invention in suit and the purpose for which it was invented as well as describe the references relied upon.

THE INVENTION IN SUIT

The invention was evolved to meet a need to effect economy and efficiency which is ever present when a building is erected on a concrete slab.

Today many houses are erected on concrete slabs as distinguished from pier foundations. To provide for plumbing connections to underground drains, boxes or openings are provided in the slab while it is being poured. Before the slab is poured, it is necessary to lay in or on the

ground, under the slab, traps and soil pipes, with one end of each trap next to a box opening so that connections from plumbing fixtures may be easily made to them. The plumbing fixtures must be properly vented. Heretofore, to accomplish this purpose, it has been customary to employ tee fittings also disposed under the slab.

A tee fitting consists of integral aligned upper and lower pipe sections with a shorter pipe section extending laterally therefrom. The lower vertical section of such fittings are adapted to be connected to soil pipes, and the upper sections received separately short lengths of pipe which are caulked thereto at their joints. Such short pipe lengths projected through the slab and are adapted to be connected to vent pipes. The short horizontally extending sections of the tees are connected to the ends of the traps which are not intended for direct connection with plumbing fixtures.

Bechtold's invention consists entirely in the unification of a tee fitting of the kind mentioned with a short pipe section (Ps. Exs. 1, 4, 5) thereby resulting in a saving in time in caulking the two parts together, saving in labor and saving in the cost of material (Tr. 10, 11). In addition Bechtold's invention eliminates the possibility of corrosion, cracking and leaks to which such joints are subjected as well as eliminates a joint test by municipal inspectors.

THE DISCLOSURE OF KIMCHE, NO. 853,413

Kimche disclosed an integral plumbing fixture having aligned upper and lower sections and a laterally extending section having an upturned end constituting a toilet bend which extends through a floor. The bend is provided with side outlets.

THE DISCLOSURE OF BOULDIN, NO. 2,499,900

The Bouldin fitting consists of many parts. The right hand portion in a closet bend, like Kimche, and the left

hand portion consists of the old fashioned tee with an upstanding pipe caulked to it. The two portions are joined together.

POINT I

The District Court Erred in Holding That All the Appellant Did Was to Reproportion or Change the Size of the Kimche or Bouldin Fitting

In the lower tribunal it was argued that appellant made in one piece that which before had been made in two pieces joined together, thus effecting substantial economies in time and money and for that reason the appellant's contribution amounted to invention. Notwithstanding the fact that the Solicitor for the Patent Office agreed that the invention consists in making divided parts integral (Tr. 7), the court declined to consider that aspect of the case and based its opinion entirely on the premise that what the appellant really did was to reproportion the parts or change the size of the fittings disclosed by Kimche and Bouldin. The specific question before this court, therefore, is whether the lower court erred in this respect. We submit that it did because—

POINT II

The Appellant's Article of Manufacture Involves Something More Than a Mere Change in Size of the Fittings Disclosed by the References Relied Upon

When a question of change in size arises in patent law it relates solely to the duplication of an article or machine in all substantial respects except the one article or machine is larger or small than the other. Many times invention is found in changing size, as where by the change cheapness or simplicity of construction or ease of operation is attained. *James Heekin Co. v. Baker*, 138 Fed. 63; *Electric Candy Machine Co. v. Morris*, 156 F. 972; *National Tube Co. v. Aiken*, 163 F. 254; *Acme Steel Goods Co. v. Am. Metal Fasteners Co.*, 206 F. 478; *Postage Meter Co.*

v. *Standard Mailing Mach. Co.*, 9 F. (2d) 19; *Aronson v. Toy Devices*, 1 F. (2d) 91. However, appellant does not claim that he changed the size of a standard tee. He added an extension to such a tee and made the extension integral with it. This made it a Hi-Top Tee. To have merely changed size it would have been necessary for appellant to have proportionately changed the size of all parts of a standard tee.

By holding that the appellant merely changed the size of the Kimche or Bouldin fitting, the court manifestly was deceived by appearances. The laterally extending toilet bends of these references does not make the fittings tees. They couldn't be used as the appellant uses his tee or as tees have been used (Tr. 26).

POINT III

The Appellant's Fitting Involves Something More Than Reproportioning the Parts of the Kimche and Bouldin Devices

The matter of change of proportion in patent law relates primarily to changes in proportion of the ingredients of a chemical compound or other compositions of matter. *Goodyear v. Vulcanite Co.*, 2 Fisher 312; *Minerals Separation v. Hyde*, 242 U. S. 261. We submit that to discuss change of proportion in connection with appellant's device is a diversion leading away from the only issue involved, viz, whether the making by appellant of a plumbing fixture in one piece that which theretofore had been made in two pieces was obvious at the time the invention was made to a person skilled in the art.

POINT IV

The Lower Court Did Not Decide the Case on the Principles of Law Involved Except, Possibly, by Inference

In view of 35 U. S. C. 103, the only valid ground for the court below to refuse the patent was that in its judgment the appellant did nothing more in making integral two old

plumbing devices than would have been obvious at the time the invention was made to the average manufacturer of plumbing fittings. As previously stated, we argued this matter and submitted a trial memorandum, which the court apparently ignored. If this court decides the case in terms of the statute and on the basis of our contention that the real question involved is concerned only with the matter of making divided parts integral, it is prayed that our trial memorandum will be taken and considered as a part of our brief on appeal.

In addition to the decisions cited in such memorandum, attention is invited to *Ex parte Daniel*, 34 F. (2) 995, 1001. In that case the Court of Customs and Patent Appeals found invention in making a single piece that which before had been made in two pieces and quoted with approval Judge Hand's opinion in *Davis Bourhville Co. v. Alexander Milburn Co.*, 297 F. 846, 551, as follows:

"However, the tip as it stands is not single and is incapable of the advantages of the plaintiff and defendant's device. It is indeed sometimes said that there can be no invention in making into two parts what was single or vice versa. So far as such statements explain any given situation, they are very well; but they should not be given as positive rules of general application. It is often invention of considerable merit to combine into one part what everyone had theretofore thought must be in two. In the case at bar it is certain that Bronsseau's torch was not fitted as a universal head for interchangeable tips, and that it required the suggestion from someone else to make it so. It is true that once one thought of it there was not much trouble in making the changes, but that is often so. Experience may show that it was necessary to adopt Bronsseau's awkward member, 32, and that the remaining two parts might be consolidated but that experience was apparently not yet at hand."

The test in such cases is, "Does the new unitary structure perform different results or possess advantages over the prior art?" Another test is if the fictitious person

who has the common knowledge and skill of the art is unable to practice the claimed invention by resorting only to the cited references and without resort to the disclosure of the claimed invention, the cited references are insufficient to negative novelty and invention. In the case at bar, we have shown by uncontrovertible proof that the Bechtold fitting meets both tests.

A typical case in point is *Pyle National Co. v. Lewin*, 92 F. (2d) 628. In that case a unitary elbow for electric conduits was involved. The elbow was adapted to be embedded in concrete and the new result consisted in the fact that the unitary elbow facilitated the threading of electric wire through the conduit.

It was also argued in that case that the elbow was so simple and obvious as not to involve intention. However, the court quoted with approval *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 402, as follows:

"But it is plain from the evidence and from the very fact that it was not sooner adopted and used, that it didn't for years occur in this light to even the most skillful persons after having been under their very eyes. They may be said to have stumbled over it; but they certainly failed to see it, to estimate its value and to bring it into notice."

"Now that it has succeeded, it may seem very plain to anyone that he could have done it as well. This is often the case with invention of the greatest merit."

POINT V

The Lower Tribunal Could Not Find That What the Appellant Did Was Obvious to a Person Skilled in the Art Without Discrediting the Testimony of All the Witnesses

All of the witnesses testified that it would not have occurred to them to make the Bechtold invention (Stutz, Tr. 31) and Holbrook deposition—and such invention was paid the compliment of copying by infringers (Tr. 19-25). In view of this testimony and the fact that the invention was immediately and extensively adopted by the trade

(Tr. 12), the comment of Justice Jackson in his dissent in *Jungerson v. Ostby*, 335 U. S. 560; 69 S. Ct. 269; 93 L. Ed. 235, is peculiarly applicable. Justice Jackson said, referring favorable to a similar opinion of Judge Learned Hand, in the Court below, that—

“It would take a singular self-assurance on the part of one who knows as little of this art as I do, or as I can learn in the few hours that can be given to consideration of this case, to ignore the judgment of these competitors who grew up in the industry and say that they did not know something new and useful when they saw it.”

CONCLUSION

In conclusion permit us to say that the whole case of the Patent Office to which the lower court subscribed is predicated on the proposition that Bechtold's invention is not an invention, but only a random notion that might have produced from the Kimche and Bouldin patents by the common man skilled in the art, although it never was and neither Kimche nor Bouldin did so, and they presumably are experts in the field. Who is the common man?

Human ability is highly variable. Presumably it follows the law of variation described by the harmonic series relating to values. Human abilities spread over a wide range so that very few persons are on the upside, and the number increases on a downward scale into mediocrity. The “common man” is well named because, as Lincoln remarked, “the Lord makes so many of them”. And the “uncommon man” is the one who has developed and put to use his rare abilities.

If Kimche and Bouldin could have simplified plumbing practices in the way Bechtold has done, it is inconceivable that they would not have done so because their fittings are directed toward similar ends.

The person is rare indeed who is capable of the basic discoveries and the improvements upon which industrial

progress is built. We submit that Bechtold's invention, while simple in its nature, is an important variation from anything previously known and has been paid the high compliment of imitation and copying (Tr. 22-25); and in the field of invention as in other fields, variation is the source of change, and the only source. As a result of variation it is possible for "offspring" to differ from their parents, whether the process be that of life or its counterpart in nonlife, such as the formation of chemical compounds or different patentable processes and mechanisms. Without variation no such change could occur.

Change, in turn, is the source of progress when the changes are favorable ones.

But variation is not enough to generate progress. Rocks are highly variable, too, in that they can be changed into something else, but they are incapable of progress. If there is to be progress, variation must be accompanied by the capacity of independent thought and action, the capacity of choice, careful preparation so as to make use of accumulated knowledge, and the willingness and opportunity to proceed alone in the search of something better. Man has all these qualities in varying degrees; and, in this country, the stimulus to invent applies to all alike, but only a few persons have all the necessary qualities in the combination required for important contribution to industrial progress. It is to these few that essentially all such progress is due.

In appraising industrial progress, it is what is delivered and utilization, and not an idea.

It takes little ability to press a light switch or to explain what happens, after the rare development of a Franklin and an Edison have mastered and simplified its uses. The world had to wait a long, long time for a Ford or a Kettering, but most anyone can learn to drive a car. Similarly, most anyone can follow in Bechtold's footsteps after

he has blazed the trail, but no one before him ever invented his fitting, which insures economies not theretofore attained. And the lower court itself, when it got the idea of means from Bechtold, was unable to reinvent his invention from the prior art, simply because there were not enough building material in the Patent Office warehouse or anywhere else. The capacity to consume, explain and deprecate is common, not rare, and most of us are capable of consuming and explaining and even condemning what only the uncommon man is capable of discovering and producing.

A new invention, if it is an important one and accepted in the channels of trade, all too frequently is an unwelcome stranger in our midst because it shocks us out of our accustomed habits of thought and action, makes our present tools obsolete and thus results in financial losses for a while, and, when it appears simple and obvious after the event, leaves us with a feeling of chagrin, disappointment, and ineffectiveness because we either did not have the perspicuity to discern what was wrong with the old tool or the capacity, knowledge and willingness to make it ourselves. It can not live except as it is allowed the protection of law, which serves to protect new discoveries in the same way a mother protects the new born child. For the seedlings of progress, like the more advanced forms of life, are unable at birth to care for themselves. They will die in infancy except for careful protection.

We ask this Court not to permit Bechtold's invention to die in infancy but to let it live for the benefit of the plumbing industry by providing it with the legal protection, which it so richly deserves. Specifically, we ask the Court to find that the references relied upon do not teach the claimed invention, and to hold as a matter of law that whenever a person possessed of the common knowledge and skill of the trade is unable to practice the claimed invention

by resort only to the prior art, *i.e.*, without resort to the disclosure of the claimed invention, the cited references are insufficient to negative novelty and invention.

All of which is respectfully submitted,

CONDER C. HENRY,
Attorney for Appellant.

APPENDIX

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The Bouldin Patent No. 2,499,900	25

Docket Entries**DISTRICT COURT:**

1955

June 9 Complaint

June 22 Answer of defendant to complaint

1956

May 21 Deposition of Haven N. Holbrook

1957

Mar. 28 Heard and finding for defendant

Apr. 5 Findings of fact and conclusions of law

Apr. 5 Judgment dismissing complaint

Apr. 17 Notice of appeal of plaintiff

Apr. 24 Cost bond filed

Apr. 29 Designation of record

Apr. 29 Plaintiff's Exhibits 1 through 3, 9, 10, 13

May 4 Transcript of proceedings

May 9 Designation of record on appeal by defendant

May 20 Order to transmit original exhibits and deposition to Court of Appeals

May 23 Plaintiff's exhibits 4, 5 and 6

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1957

May 27 Transcript of record

Sept. 25 4 copies of appellant's motion for leave to file brief, time having expired, and to extend time time file brief to October 28th.

* * * * *

Complaint (Letters Patent)

The plaintiff states as follows:

1. The plaintiff, Joseph C. Bechtold, is a citizen of the United States and a resident of Newport Beach in the county of Orange and State of California, and brings this suit in his own right.

2. The defendant, Robert C. Watson, is the Commissioner of Patents of the United States, a legal resident of

the District of Columbia, and is sued as Commissioner of Patents of the United States.

3. This complaint is filed in accordance with the provisions of the Federal Laws of the United States as provided for in 35 U. S. C., 145.

4. The plaintiff, Joseph C. Bechtold, filed an application for patent in the United States patent office entitled "Soil Pipe Plumbing Fitting", on November 23, 1951, which was given serial number 257,819.

5. The said application was filed in accordance with the laws of the United States and the rules of the Patent Office.

6. The said application has been duly prosecuted in accordance with the laws of the United States and rules of the Patent Office.

61 7. The said application has been passed upon by the Primary Examiner who disallowed all of the claims in the application, reading as follows:

Claim 1. A cast-iron soil pipe plumbing fitting of the tee type comprising a lower vertical section adapted to be coupled to a soil pipe, an intermediate section at right angles to said lower section, and an upper vertical section having its axis coincident with the axis of said lower vertical section and approximately three times the length of said lower vertical section, the length of said upper vertical section being sufficient to extend through the floor of a house when said intermediate section is approximately six inches below said floor, said intermediate section being shorter than said lower vertical section.

Claim 2. A cast-iron soil pipe tee fitting for use under a concrete slab of approximately four inches thick comprising a tee having a horizontal section to which a "P" trap is connectable, a lower vertical section at right angles to said first mentioned section and adapted to be connected to a soil pipe, and an upper vertical section having its axis coincident with the axis of said lower section and approximately three

times the length of said lower vertical section, the length of said upper vertical section being sufficient to extend above the surface of said concrete slab when said first mentioned section is approximately six inches below said slab, said horizontal section being shorter than said lower vertical section.

Claim 3. A cast-iron soil pipe tee type fitting for interconnecting a trap, a soil pipe, and a vent pipe, and for use under and through a floor comprising a horizontal section adapted to be connected to said trap, a lower vertical section adapted to be connected to said soil pipe, and an upper vertical section adapted to be connected to a vent pipe, said connection to said vent pipe being above said floor, the length of said upper vertical section being approximately three times the length of said lower vertical section and the length of said horizontal section being less than the length of said lower vertical section.

Claim 4. A tee type fitting in accordance with claim 3, in which the length of said upper vertical section is over ten inches.

8. The applicant appealed from the decision of the
60 Primary Examiner to the Board of Appeals who affirmed the rejection of the Primary Examiner in their decision dated April 27, 1955.

9. The Commissioner of Patents by the Board of Appeals held that the soil pipe fittings shown in the references

Kimche, 853,410, May 14, 1907, and
Bouldin, 2,499,900, March 7, 1950,

anticipate the applicant's invention as above claimed and that the plaintiff-applicant made no invention in view of each of these references.

10. The plaintiff-applicant disagrees with these contentions of the Commissioner of Patents and contends that neither pipe fitting shown in the references nor any pipe fitting can be or has been used in the manner that the applicant's is used and as called for by the claims above quoted, and that such claims involve invention.

11. The plaintiff further states that the said invention is new and useful, and was not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof or more than one year prior to his application for patent therefor, and not in public use or on sale in this country for more than one year prior to said application, and not patented in any foreign country by him or his legal representatives on an application filed more than twelve months prior to said application for United States patent and not abandoned.

WHEREFORE the plaintiff prays that this Honorable Court decree that the Commissioner of Patents be directed to allow the said claims, and such other claims as upon hearing the Court may find patentable.

* * * * *

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Answer to Complaint

To the Honorable the Judges of the United States District Court for the District of Columbia.

1. The defendant admits the allegations of paragraph 1 of the complaint.

2. He admits that as Commissioner of Patents his official residence is in the District of Columbia and that he is sued in his official capacity.

He admits the allegations of paragraphs 3, 4, 5, and 6.

7. He states that in claim 1, as it appears in paragraph 7, the word "vertical" should be inserted after the word—lower—in the last line. He admits the remaining allegations of paragraph 7.

8, 9. He admits the allegations of paragraphs 8 and 9.

10. He admits that the plaintiff disagrees with the decision of the Patent Office and makes the contentions set

forth in paragraph 10. He denies that such contentions are correct or that they justify the issuance of a patent to the plaintiff containing any of the claims here involved.

11. He denies the allegations of paragraph 11.

FURTHER ANSWERING, the defendant states that the plaintiff is not entitled to a patent containing any of the claims referred to in the complaint for the reasons given and in view of the references cited in the Examiner's answer and the decision of the Board of Appeals in the application here involved. Profert of copies of the said answer, decision, and references is hereby made.

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Opinion of the Court

THE COURT: The alleged invention consists of an elongated single piece, tee type, pipe fitting used in the plumbing industry. The prior usage was to use two pieces instead of a single piece, the two pieces being joined together. It has been held that to make as a single element what has previously been made out of two pieces may or may not constitute invention, depending on the circumstances, *Krementz v. Cottle Company*, 148 U. S. 556.

In this case, however, we are not confronted with the problem of determining whether it was or was not invention to make a new tee fitting out of a single piece, the prior usage having been to make it out of two members joined together.

The prior art, consisting of the patent to Kinche, 853,413, issued on May 14, 1947, and the patent to Bouldin, 2,499,900, issued on March 7, 1950, show one piece pipe fittings. The Board of Appeals of the Patent Office held that there is no invention in changing the size or proportion of a device or machine so long as its construction and principle of operation remain the same. In other words, the mere fact that the applicant's single piece member is somewhat longer than that shown in the prior art patents does not constitute invention.

The holding of the Board of Appeals of the Patent
 47 Office is supported by the decision of the Court of
 Customs and Patent Appeals in the case of *In re*
Williams, 36 F. (2) 436, in which it was held that "there
 is no invention in changing the size or proportion of the
 device or machine so long as the construction and mode
 of operation remains the same."

It is argued that the fittings disclosed in the *Kimche* and
Bouldin patents are not tee fittings. That circumstance,
 however, is purely incidental and does not in the opinion
 of the Court affect the weight of those two patents as prior
 art. They do disclose the concept of making plumbing
 fittings out of a single piece instead of two pieces joined
 together.

In view of the circumstances, the Court finds no error
 in the ruling of the Board of Appeals of the Patent Office,
 and therefore will render judgment on the merits in favor
 of the defendant, the Commissioner of Patents.

* * * * *

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Findings of Fact

1. This is a civil action brought under 35 U. S. C. 145
 in which the plaintiff, Joseph C. Bechtold, sought to have
 the Court authorize the issuance of a patent for an alleged
 invention as specified in claims 1 through 4 of his applica-
 tion for patent, Serial No. 257,819. In that application no
 claims were allowed by the Patent Office.

2. The application disclosure and claims before the
 Court relate to a cast-iron soil pipe plumbing fitting of the
 tee type comprising a lower vertical tubular section, an
 intermediate tubular section at right angles to the lower
 section, and an upper vertical tubular section coincident
 with the axis of the lower vertical section and approxi-
 mately three times the length of the lower vertical section,
 the intermediate tubular section being shorter than the
 lower vertical section. This fitting is disclosed as for use

in connecting bath-tubs or showers and their vents to soil pipes in houses erected on a concrete slab laid directly on the ground. The fitting when installed for such purpose is located primarily under the slab but the upper vertical section extends through and above the slab.

3. The tee fittings heretofore commonly used in making similar connections were of such dimensions and shapes as to require the caulking thereto of an extra piece of pipe in order to extend the upper vertical portion above the floor slab to the point of connection of the vent pipe.

4. Plaintiff's tee fitting for the disclosed purpose makes integral the tee fitting commonly used and the extra piece of pipe commonly used for extending the upper vertical portion above the floor slab.

5. The patent to Kimche No. 853,413 discloses an integral fitting including a tee portion located below a floor, the fitting including a lower vertical section, an intermediate section at right angles to the lower section, and an upper vertical section sufficiently long to extend through and above the floor, the intermediate section requiring no extra caulked joint such as joint 15 in Fig. 1 of plaintiff's application, and being purposefully longer than the lower vertical section.

6. The patent to Bouldin No. 2,499,900 discloses an integral fitting including a tee portion located below a floor, the fitting including a lower vertical section, an intermediate section at right angles to the lower section, and an upper vertical section more than three times the length of the lower vertical section and sufficiently long to extend through and above the floor, the intermediate section requiring no extra caulked joint such as joint 15 in Fig. 1 of plaintiff's application and being purposefully longer than the lower vertical section.

7. Each of the patents to Kimche and Bouldin discloses an integral fitting structure which includes not only a

tubular tee but also additional structure including, without a caulked joint, an extension and upturned end on the horizontal intermediate section. The disclosure of the additional structure is purely incidental to the material disclosures in these patents of the concepts of multiple pipe or fitting elements made integral and of integral tubular tee portions having an upper vertical section long enough to extend through and above a floor slab.

8. The fact that plaintiff's upper vertical section is longer or shorter than that of either of the reference patents is not a material variation since the basic principle is the same.

9. Plaintiff's claimed fitting structure involves no material variation of the disclosure of either of the Kimche or Bouldin patents.

10. Plaintiff's fitting is the product of mechanical skill rather than of the inventive faculty.

11. Plaintiff's claims 1 through 4 define no invention over either the patent to Kimche No. 853,413 or the patent to Bouldin No. 2,499,900.

Conclusions of Law

1. There is no invention in changing the size or proportion of a device or machine so long as its construction and principle of operation remains the same.

2. Plaintiff is not entitled to a patent containing any of claims 1 through 4 of the application Serial No. 257,819.

3. The complaint should be dismissed.

(Sgd.) ALEXANDER HOLTZOFF,
Judge.

April 5, 1957.

* * * * *

POINT I

**OBVIOUSNESS OF AN INVENTION IS AN ASSUMPTION
WHICH MUST BE VERIFIED**

As for reasons for refusing the claims now under consideration the Board of Appeals said—

“It is the Examiner's opinion that it would obviously be devoid of invention to extend, or shorten, the upper vertical section of either Kimche or Bouldin, as desired, since such modification and the provision of specific distances between the floor and specified portions of the fitting or soil pipe involves merely a matter of dimensioning which is in the realm of design rather than invention and obviously requires only the exercise of mechanical skill.”

The Board agreed with this rejection.

In other words, the Board does not hold that the references relied upon actually teach the invention now claimed, but rather than any skilled workman, with the two references before him, could have arrived immediately and without any special thought on the subject, at the solution of the problem which the plaintiff solved. In this view, we submit, the Board was wrong because the concept of obviousness is one of delusive simplicity, and the generality of the concept often leads to excesses in its application, especially when an invention is viewed in retrospect.

Too many times the Patent Office drifts into error by rejecting claims on the grounds of obviousness all because inventors took the seeming mysteries out of their inventions by so skillfully describing them in their patent specifications as to make them appear simple to the reader. Thus, in such cases, inventors are penalized for meticulously complying with the law which requires them to file in that Office full and clear written descriptions of their inventions which can be readily understood (35 USC 33).

While the Courts have not laid down a rule as to what constitutes obviousness of an invention, yet long prior to the 1958 Patent Act they repeatedly made it plain that obviousness of such intangibles is not a matter of individualistic or vicarious opinion, but rather is a verifiable assumption—an assumption provable in accordance with Court rules designed to give reasonable and systematic meaning to that generality. And the more obvious an invention is, the easier it is to prove. If the assumption cannot be proved—is legal free-thinking—it is palpably false. To hold otherwise would be an abandonment of a fundamental premise of our legal system, *viz.*, that Courts administer justice not according to the personal notions of the judge but according to law. This principle is succinctly stated in *McMichael, et al. vs. Stafford, et al.*, 165 F. 380, 382 wherein the Court said: "Want of invention must be proved; it ought not to rest on guesswork."

The principle that obviousness of an invention is a verifiable assumption, which principle stems from case law, is now incorporated in the patent act itself. The statute (35 USC 103) includes a requirement for invention, and want of invention is expressly stated by reference to the preceding section of the Code (35 USC 102) in terms of obviousness-obviousness at the time the invention was made in view of the statutory bars set forth in that section, which bars include prior knowledge in this country as well as prior printed publications. In other words, a valid assumption of obviousness at the time the invention was made now as in the past must be predicated upon credible documentary evidence which is clear and convincing on its face, or it must be shown that the attacking invention was of such common knowledge in this country at the time the invention was made that every person who is possessed with the ordinary skill of the calling could conscientiously testify under oath that, without experimentation or other special effort and work, he could have produced the same invention, without any knowledge of what the inventor did,

immediately upon being apprised of the problem which the inventor solved. This is just another way of saying that a finding of obviousness is justified only when there was no problem to be solved as shown by the evidence, for a problem connotes something baffling or hidden from view, and the instantaneous solution of a problem suggests that there was not a problem in the first place.

Manifestly, when obviousness is the criterion for refusing claims, three questions arise immediately: First, obvious to whom? Second, what was obvious? Third, when and how did the invention become obvious?

A person shall be entitled to a patent for his invention or discovery as provided in 35 U. S. C. 101, subject to the conditions set forth in Sections 102 and 103 thereof. The latter (103) reads as follows:

"S. 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained through the invention is not identically disclosed or described as set forth in section 102 of this title, if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been *obvious* at the time the invention was made to a person *having ordinary skill in the art to which said subject matter pertains*. Patentability shall not be negatived by the manner in which the invention was made.

The Board answered all three questions by holding that the claimed invention was obvious to any plumber at any time after the grant of the patents relied upon as references in this case. In this respect the Board made an unverifiable assumptions because—

A. BECHTOLD'S INVENTION WAS NOT OBVIOUS TO ANYONE

As opposed to the quoted findings with respect to the first question, "Obvious to whom?" reference is made to the fact that the witnesses Bechtold and Holbrook who

testified that there had always been a need for Bechtold's invention in areas where houses were built on concrete slabs and they knew of such need, yet it did not occur to them how to solve the problem which Bechtold solved.

We note in this connection that all of the witnesses said that Bechtold's invention was not obvious to them. However, the Board takes the view that the discovery of the claimed invention was simple as falling off a log—although everyone was careful since the dates of the patents relied upon, not to fall off the log—and it only remains now, with the wisdom to teach us which comes after the fact, to find that the plaintiff discovered nothing, invented nothing, and accomplished nothing. No invention was ever made that would not have withered at the roots under that rule as thus applied, and the adoption of the postulate on which the Board's opinion is based as a general working principle, in the absence of clear and believable evidence, would be to use the patent laws to destroy its own objective by limiting and denying rights its real purpose is to establish and respect.

B. BECHTOLD'S INVENTION WAS NOT OBVIOUS IN VIEW OF ANYTHING DISCLOSED BY KIMCHE

The uncontradicted testimony is that Kimche's fitting is totally unlike the invention now claimed and is outlawed in California and most of the other western states because several other fixtures waste into the closet vent ahead of such vent which results in a tendency to create a vacuum and thus siphon the traps out of all the small fixtures, which is against all Western plumbing codes. Also, there is no tee and no trap.

C. BECHTOLD'S INVENTION WAS NOT OBVIOUS IN VIEW OF ANYTHING DISCLOSED BY BOULDIN

As to Bouldin, the uncontradicted testimony is that it would be utterly impossible to use Bouldin's fitting for the purpose that Bechtold's fitting is intended, principally

because Bouldin's fitting (right hand section) has a clean-out and a tapped connection incorporated in the fitting which Bechtold's fitting does not have) and because the two fittings are designed for entirely different purposes. As to the left hand portion of Bouldin's fitting, it has been testified that there would be no way of using this section for the purpose for which Bechtold's fitting is intended to be used.

It is submitted, therefore, that these references are not anticipatory of the claimed device.

What the Patent Office seems to have had in mind is that the thing that was obvious was to form in one piece inseparably connected that which before had been made in two parts and later jointed together. If this be true, it would seem to have far better for the refusal to allow the claims in dispute to have been based on that fact alone and Bechtold's admission of what is old, and thus focus attention at once on the law of the case.

The controlling case on the subject seems to be *Krementz v. The S. Cottle Co.*, 148 U. S. 556.

The invention in that case consisted of a collar button having a hollow head and stem, the button being formed and shaped out of a single continuous plate of sheet metal. The old method of making such buttons was to make them of solid metal in two parts and solder the parts together. The advantages of making them out of a single sheet of metal were doing away with soldered joints, lightness as compared with the solid buttons, and cheapness by using less material. The Court said:

"When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use and has displaced other devices which had previously been employed for analagous use, is sufficient to turn the scale in favor of the existence of the invention" (pp. 560-651).

This case laid down the rule which the Courts have subsequently followed. For example, the Court of Customs and Patent Appeals said (97 USPZ 150) *In re Tanczyn*—

“With applicant’s application before one, it may be possible to look back at references and say that they suggested applicant’s claimed product, but which hindsight should not defeat right to claims”.

Appellant has changed the proportions of a critical element of the tee, this element being the upper section 28 of the tee 25, which resulted in the section 21 as shown in Fig. 2. The Court of Customs and Patent Appeals in *re O’Keefe* (97 USPQ 157) recognized that a change in proportions can be inventive and patentable when it said:

“Invention may be involved in the development of a crowded art by a change in the proportions of a critical element of an operating device. *Eibel Co. v. Paper Co.*, 261 U. S. 45. There Chief Justice Taft, in writing the opinion of a unanimous court, pointed out that the disclosure of a meritorious improvement on a machine, substantially advancing the art, is entitled to a liberal construction.”

As mentioned previously, the problem of avoiding the joint and the use of the extra piece of pipe to extend through the slab has existed for some time, and, as the Court said in *Watson, et al. v. Heil, et al* (97 USPQ 334):

“The principle of patent law involved in these cases is that where has existed for a considerable period of time a problem in an industry as to how a result could be achieved, *the discovery of even a slight change in former processes which for the first time accomplish the desired result may amount to the dignity of invention.* (Emphasis ours.)

It is realized that the article invented and being claimed is a simple one, but the Court is respectfully referred to the decision of the U. S. Court of Customs and Patent Appeals *In re Hubbell* (607 O. C. 575), in which it was

held inventive to make integral that which in the past had been in several pieces, the Court saying:

"We think in cases like that at bar where the article produced is novel, useful, and not anticipated by the prior art that it should be regarded as involving the element of invention, notwithstanding the *simplicity of the inventive thought* when once arrived at, and that what appellant has done, judged by any standards announced by the courts, is entitled to patent protection. The decision of the Board of Appeals is reversed." (Emphasis ours.)

The District Court also held in *Bradley, et al. v. The Great Atlantic and Pacific Tea Company* (77 USPQ 343), that even though the device is simple and inexpensive *does not detract from, but adds to, presumption of patentability*. In the present instance, appellant's device is certainly simple and inexpensive even when compared with the prior type of tee. However, the simple change has resulted in such a savings in time and effort that the results were not normally foreseeable. As was stated by the Circuit Court of Appeals, Fourth Circuit, (77 USPQ 439), *knowledge after the event is always easy, and problems once solved appear as never having presented difficulty*. The court said it must try to avoid danger of thinking that there is no invention merely because the court can understand mechanism after it has been explained.

The Court of Appeals of the Tenth Circuit in *Harris, et al.*, doing business as *H-C Products Company v. National Machine Works, Inc., et al.* (79 USPQ 320), stated the same thought, as follows:

"Now combination of old elements may amount to invention; that, viewed in retrospect, conception seems simple does not justify denial of inventive genius where *need for device long existed and solution did not occur to those skilled in art*: while device is combination of old elements, it accomplishes old results in more facile, economical, and efficient way in environment which presented peculiar and difficult problems." (Emphasis ours.)

The decisions have put it beyond doubt that the test of invention in a case such as the one at bar should not be, could one skilled in the art, after seeing the invention, assemble the ideas from specially selected references in the manner taught by the invention undergoing test? Rather, the test is: would he, without knowledge of the invention, be led to make the selection of the particular references from the entire art and modify and combine them in the manner taught by the inventor, without the exercise of the inventive faculties? *Ideal Stopper Co. et al., v. Crown Cork and Seal Co.*, 131 F. 244; *Faries v. Brown*, 121 F. 547; 57 CCA 609. In the words of the Court in the latter case;

“The eye that sees a thing already embodied in a mechanical form gives little credit to the eye that first saw it in the imagination. But the difference is just that between what is common observation and what constitutes an act of creation. The one is the eye of inventive genius; the other of a looker on after the fact.”

The disclosure of the application should, as far as possible, be excluded from view. *Railroad Supply Co. v. Hart Steel Co., et al.*, 222 F. 261, 273. The anticipation must be clear and unequivocal, and must contain adequate directions for the practice of the invention without resort to the application. *Lorenze et al. v. Colgate-Palmolive-Peet Co.*, 65 USPQ 514.

In addition to the foregoing, the Court may choose to note that the British Courts have adopted the same view and have given us a singularly sensible test of the rule of anticipation and obviousness, by asking the question: “Would a man who was grappling with the problem solved by the patent attacked, and having no knowledge of that patent, if he had had the alleged anticipation in his hand said: ‘That gives me what I wish’?”. *British Thompson Houston Co. v. Metropolitan Vickers Electrical Co.*, 45 R. P. C. 22, cited in our domestic case *Skelly Oil Co. v. Uni-*

versal Oil Products Co., 1 USPQ 18; 31 F. (2d) 427, 431. This prompts the inquiry, "Having learned of the plaintiff's fitting and having familiarized itself with the need therefor, would the prior art be the preference of the Board if it were also the responsible managing directors of a plumbing contracting company?"

D. BECHTOLD'S FITTING DID NOT BECOME OBVIOUS UNTIL AFTER HE REDUCED HIS INVENTION TO PRACTICE

With respect to the third question, "When did the fitting become obvious?" The Board in an effort to make the improbable seem plausible, said in effect that it always had been since the dates of the patents relied upon as references; that any person skilled in the art who was familiar with the references knew something that wasn't so. In reaching this conclusion, the Board was without information concerning the true nature of the references and overlooked the real purpose of the patent law.

The patent laws were intended to encourage inventors by placing before the would-be inventor the hope of reward if he devised or discovered something novel and useful and published the novel discovery to the world.

In this connection, we contend that discovery or creative ability in the human mind can extend only to finding and using the potentialities inherent in things which man finds at hand; and the finding of new relationships between known things, or making use of relationships already discovered, which results in an advance in technological knowledge beneficial to society, are the earmarks—probably the only ones—of a true Inventor. Inventions do not come from a man with a "quickie" idea who has an intellectual hunch. Ofttimes they are made by the perception of new possibilities and the recognition of deficiencies in existing things followed by action resulting in the creation of a new instrumentality capable of more efficient use than the thing for which it is a substitute. This Bechtold did.

It is the spirit of the patent laws to encourage the American worker, by holding out to him the hope of profit as well as the desire for fame, to apply his intellect to the improvement of the machines, tools, materials and processes with which he works. It is by this means that all arts have broadened and widened and deepened with step by step improvements, many of which today seem exceedingly small. Remove this hope provided by our patent system, and there remains no incentive for any worker to rise above the mass and do more than what is commonly done. This thought was best expressed by the Court in *McMichael et al. v. Stafford et al.*, 165 F. 380, 382, previously cited. In that case the Court said:

"The invention was not a great one. Such inventions may occur, but the probability is that they will appear with less frequency in the future than in the past. It would probably be a conservative estimate to say that 90 per centum of the patents now evolved are for improvement in existing methods and machines. It is the spirit of the patent law to encourage those who develop these improvements and keep people in the van of industrial development. Remove this hope and inspiration and the American workers will become a soulless automaton with no more ambition than in the tools of iron and brass with which he works."

Like the case at bar, the invention in the *McMichael* case is a simple one. It involved the substitution of a divided dial covering plate for an integral dial so that when lint jammed the needle used in the machine and other parts under the plate, only a part of the divided plate need be removed to remedy the difficulty. This took only fifteen minutes, whereas to remove the undivided plate sometimes took as much as a half day.

Bechtold certainly evolved something new which was paid the high tribute of imitation by his contemporaries. and thereby promoted "the progress of science and the useful arts", which is all that the Constitution itself requires (Const. Art. 1, Sec. 8).

POINT II

The High Degree of Utility of Plaintiff's Fitting in a Well-Developed Art is Strong Evidence That He Made a Needed and an Unobvious Improvement

In arguing that utility is one of the factors in determining invention, we are acutely aware of the fact that it has been consistently held that utility of itself is neither invention nor conclusive evidence of it, yet utility has, as a very practical matter, been accorded the greatest weight in determining invention, particularly where, as here, the claimed invention is new and cannot be produced from the prior art, and the prior art does not suggest the invention. Numerous cases so hold. For example, the Supreme Court in the *Eibel* case, 261 U. S. 45, 46; 67 L. Ed. 523, 529, said that:

"The fact that Eibel pitch has thus been generally adopted in the papermaking business and that the daily product in paper making has thus been increased at least twenty per cent over that which had been achieved before Eibel is very weighty evidence to sustain the presumption from his patent that what he discovered and invented was new and useful . . ."

Also, in the case of *Minerals Separation v. Hyde*, 242

U. S. 261, 276; 61 L. Ed. 286, 293, the Supreme Court said:

"The record shows not only that the process in suit was promptly considered by the patentees as an original and important discovery, but that it was immediately generally accepted as so great an advance over any process known before that, without puffing or other business exploitation, it promptly came into extensive use for the concentration of ores in most, if not all, of the principal mining countries of the world, notably in the United States, Australia, Sweden, Chile, and Cuba, and that because of its economy and simplicity, it has largely replaced all earlier processes. This, of itself, is persuasive evidence of that invention which it is the purpose of the patent laws to reward and protect."

See, also, *Carbide and Carbon Chemical Corp. et al. v. Coe*, 40 USPQ 141, 146.

No matter what guides are used, it is still necessary to look at the final product or result in determining whether a thing or process is patentable, *i.e.*, it is necessary to determine the question of patentability objectively, as held by the Court of Appeals, D. C., in *L-O-F. Glass Fibers Co. et al. v. Watson, Com'r.*, cited.

CONCLUSION

In view of the foregoing, it is submitted that insofar as the rejection is based on references, this case can be, and we think will be, decided upon the legal evidence in the record and not upon the erroneous opinion of the Board. And the uncontradicted testimony of a plurality of unimpeachable witnesses demonstrates that the Plaintiff's fitting is not obvious from the references relied upon any more than it would be from a dictionary in which words descriptive of the invention can be found. Contrariwise, it is further submitted that the plaintiff displayed in a marked degree the three qualities an inventor needs most—inspiration to find out what was wrong with the older methods; tenacity of purpose to work toward that end which, in the instant case, resulted in the establishment of a new goal, and craftsmanship to reach such goal—and thereby produce a substantial improvement in plumbing fixtures.

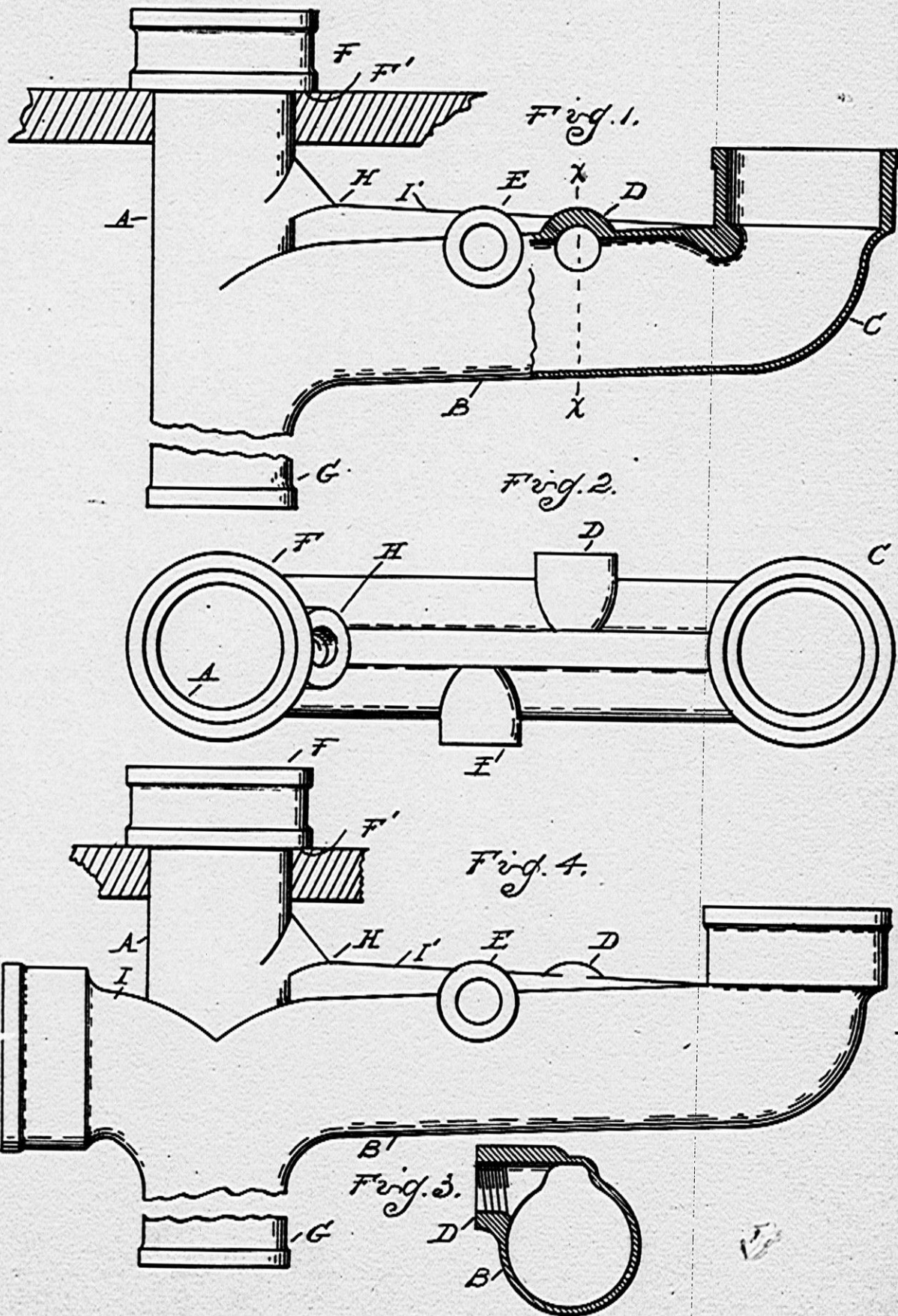
Accordingly, it is requested that the decision appealed from be reversed and that this Court render such decision as the Board should have rendered.

No. 853,413.

PATENTED MAY 14, 1907.

F. KIMCHE.
PIPE FITTING.

APPLICATION FILED NOV. 10, 1906.



Witnesses
James P. Barry
Melba Williams

By

Inventor
Fisel Kimche

Whittemore Hubert Whittemore
attys.

UNITED STATES PATENT OFFICE.

FISEL KIMCHE, OF DETROIT, MICHIGAN.

PIPE-FITTING.

No. 853,412.

Specification of Letters Patent.

Patented May 14, 1907.

Application filed November 10, 1906. Serial No. 342,895.

To all whom it may concern:

Be it known that I, FISEL KIMCHE, a citizen of the United States of America, residing at Detroit, in the county of Wayne and State of Michigan, have invented certain new and useful Improvements in Pipe-Fittings, of which the following is a specification, reference being had therein to the accompanying drawings.

It is the object of the invention to obtain a fitting especially designed for use in bath rooms, to which all of the drain connections may be easily and quickly attached, and which will conform to all the sanitary requirements in force in many municipalities at the present day.

To this end, the invention consists in the peculiar constructions of a tee or cross pipe fitting, as hereinafter set forth.

In the drawings, Figure 1 is a side elevation of the fitting; Fig. 2 is a plan view thereof; Fig. 3 is a cross section on line $x-x$, Fig. 1; and Fig. 4 is a view similar to Fig. 1 illustrating a modification.

In general construction, my improved fitting comprises a vertical pipe section A of a suitable size to form the soil pipe of a closet, and one or more integral laterally extending pipe arms B, to which the various pipe connections are attached. As illustrated in Fig. 1, the arm B is provided at its outer end with an up-turned elbow C, adapted for direct connection with the closet. Intermediate this elbow in the pipe section A are laterally extending nipples for connecting with the other drain pipes, such as that of a washstand and a bath tub. I preferably provide two of these nipples D and E extending oppositely from the upper portion of the pipe arm B. Thus, in use, the vertical section A may be arranged conveniently for connection with the downwardly extending soil pipe, and at its upper end is connected to the upwardly extending air vent pipe. The upper and lower ends of this section A, F and G, are suitably fashioned for connection with the adjoining pipe sections, the one forming the socket member, and the other a member for fitting the socket of an adjacent pipe.

The construction as thus far described is adapted for use in an ordinary house bath room, and when the various drain connections are attached, an absolutely tight system will be formed. If, however, the fitting is used in flats or other places where connec-

tions are to be made on different floors with a common vertically extending soil pipe, the section A is connected into this pipe to form a portion thereof. For such a use, it is necessary to provide a separate vent connection, and to this end a nipple is formed at the intersection of section A with the upper side of the arm B, as illustrated at H. To this nipple a vent pipe may be attached, which can be arranged parallel to the vertical soil pipe.

In Fig. 4 is illustrated the construction in which there is a second laterally extending arm I formed integral with the section A, and preferably directly opposite the arm B. This arm is adapted for connection with a laterally extending soil pipe from another closet where there are more than one upon the same floor.

The socket member F, in addition to its function as a coupling with the upwardly extending pipe, also forms a support for the fitting upon the floor. As illustrated in Fig. 1, the shoulder F' is adapted to rest directly upon the floor and support the fitting between the floor and the ceiling of the lower room.

In order to provide proper drainage, the laterally extending arm B is provided with a downward inclination from the upturned elbow to the vertical section A. To prevent interference with the vent connection, by reason of this downward inclination, the upper portion of the arm is provided with a channel I', which is inclined upwardly from the elbow to the vertical pipe. The laterally extending nipples D and E intersect the arm B in the upper portion thereof, and thus communicate both with the said pipe and the channel I' thereof.

What I claim as my invention is:

1. A pipe fitting comprising a vertical pipe section, an integral laterally extending pipe arm terminating in an upturned elbow, and one or more connections to said arm intermediate said elbow and the vertical section, said arm having a vent channel therein communicating with said connections.

2. A pipe fitting comprising a vertical section, an integral laterally extending pipe arm terminating in an upturned elbow and oppositely laterally extending nipples or pipe connections on said arm intermediate said elbow and the vertical pipe section, said arm having a vent channel communicating with said nipples.

3. A pipe fitting comprising a vertical pipe section, an integral laterally extending pipe arm terminating in an upturned elbow, a laterally extending nipple or pipe connection on said arm, said arm having a vent channel opening from said nipple and a nipple or pipe connection for the connection of said channel with a vent pipe.

4. A pipe fitting comprising a vertical pipe section, oppositely laterally extending pipe arms integral with said vertical section, one of said arms terminating in an upturned elbow, one or more laterally extending nipples or pipe connections on one of said arms and a vent connection leading from said nipples, for the purpose described.

5. A pipe fitting comprising a vertical pipe section, an integral laterally extending pipe arm terminating in an upturned elbow, one or more pipe connections to said arm intermediate said elbow and the vertical section, a vent connection communicating with said pipe connections and a socket coupling formed at the upper end of the vertical section having a shoulder forming a support for the fitting.

6. A pipe fitting comprising a vertical pipe section, an integral laterally extending pipe arm terminating in an upturned elbow and inclined downwardly from said elbow to said vertical section, the upper position of said arm being provided with a channeled portion forming a vent inclined upwardly from the elbow to the vertical section.

7. A pipe fitting comprising a vertical pipe section, an integral laterally extending pipe arm terminating in an upturned elbow, said arm being inclined downwardly from said elbow to said vertical section, a channeled ex-

tension of said arm forming a vent inclined upwardly from said elbow to said vertical section, and a connection extending laterally from said arm intersecting the same in direct communication with said channel.

8. The combination with a vertical pipe, of a laterally-extending pipe connected therewith, and terminating in an up-turned elbow, a pipe connected with said laterally-extending portion intermediate said elbow and vertical pipe, and a channel forming a constant air communication between the last mentioned pipe and said vertical pipe, said channel being formed within the upper portion of said laterally-extending pipe.

9. The combination with a vertical pipe, of a laterally-extending pipe connected therewith, and terminating in an up-turned elbow, a channel within said laterally-extending pipe above the level of the elbow and communicating with said vertical pipe, and a nipple on said laterally-extending pipe forming a connection in constant communication with said air channel.

10. A pipe fitting comprising an elbow having a laterally-extending arm, a channel formed in and extending longitudinally of said lateral arm above the level of its communication with the vertical portion of the elbow, and a pipe connecting with said lateral arm in direct communication with said channel.

In testimony whereof I affix my signature in presence of two witnesses.

FISEL KIMCHIE.

Witnesses:

NELLIE KINSELLA,
AMELIA WILLIAMS.

March 7, 1950

25
J. W. BOULDIN

2,499,900

UNIVERSAL PLUMBING FITTING

Filed April 1, 1947

2 Sheets-Sheet 1

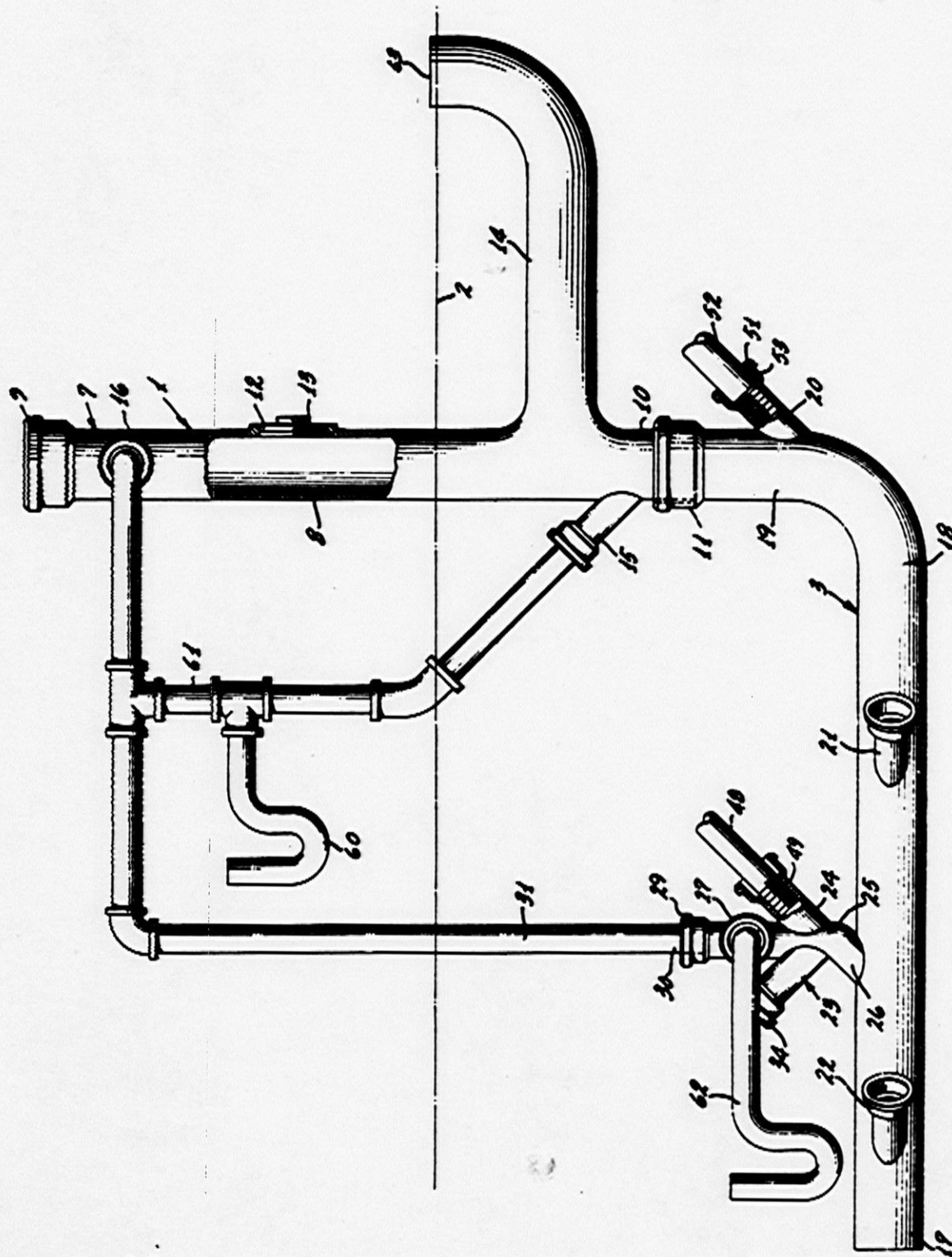


Fig. 1.

INVENTOR:
JOSEPH W. BOULDIN
BY *W. A. Beatty*
ATTORNEY

March 7, 1950

27
J. W. BOULDIN

2,499,900

UNIVERSAL PLUMBING FITTING

Filed April 1, 1947

2 Sheets-Sheet 2

Fig. 2.

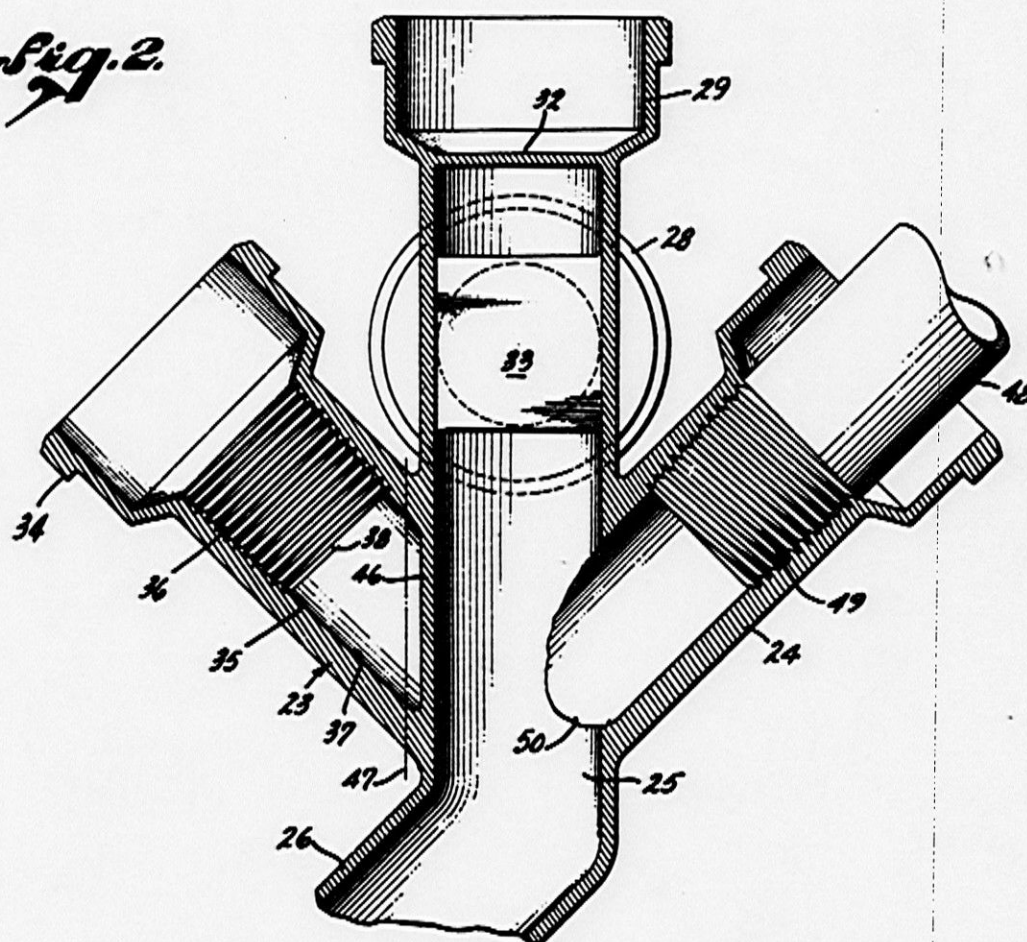
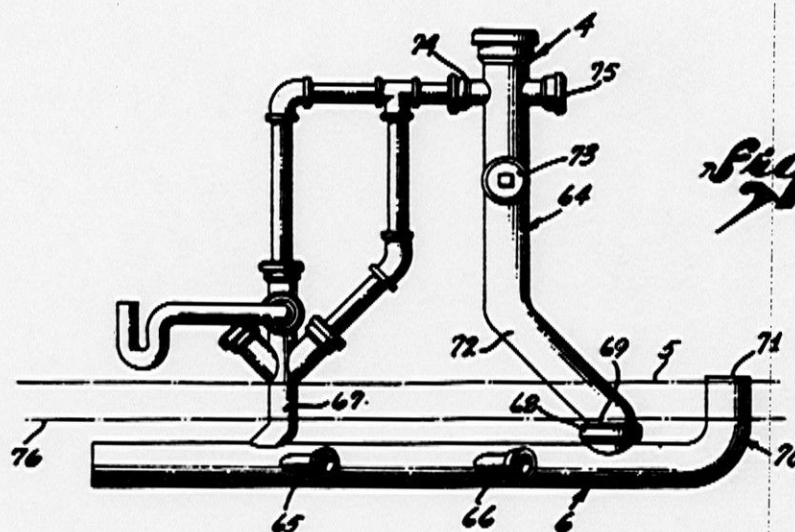


Fig. 3.



INVENTOR:
JOSEPH W. BOULDIN
BY *W. A. Beatty*
ATTORNEY.

UNITED STATES PATENT OFFICE

2,499,900

UNIVERSAL PLUMBING FITTING

Joseph W. Bouldin, Los Angeles, Calif.

Application April 1, 1947, Serial No. 738,683

1 Claim. (Cl. 4-211)

1

The invention relates to a universal plumbing fitting and has for an object to save time required to caulk and connect a number of waste pipes and vent pipes as is at present required when installing the plumbing in a dwelling.

According to prior plumbing practice, the waste and vent fittings are made up in separate units which can be connected together in various fashions to meet the requirements of a given arrangement of rooms or offices and to meet the requirements of certain States for back venting. While these separate units have the advantage of flexibility in that the units can be connected together in many different combinations, it has the economical disadvantage that it takes time to connect up the various units as required.

An object of the present invention is to provide plumbing fittings which reduce the amount of time required to install the plumbing system, while also having the advantage of making it possible to connect waste and vent pipes in various combinations.

According to the present invention, there is provided a main plumbing fitting cast in one piece and corresponding to a number of straight sections and one or more elbows or branches formerly supplied in separate units, and the thing which makes it possible to employ this integral unit as a universal fitting, whether as a horizontal waste or soil pipe, or as a vertical combination vent and waste pipe, with an integral toilet bend on the soil pipe or the waste pipe, is an adapter or coupling which is cast integral with the main body of the fitting. This adapter is provided at various places on opposite sides and along the length of the main body and the risers or branches therefrom. This coupling is in the form of a lateral branch having a bell end or socket in which a pipe may be caulked. Also, this coupling has a reduced intermediate portion having threads so that a waste or vent pipe of smaller diameter may be threaded into it. The bottom of the coupling has a wall which, in fact, is an integral part of the wall of the main fitting. This coupling gives considerable flexibility in the plumbing system, because three choices are possible. In the first place, the bottom wall of the coupling may be left intact in the event that it is not desired to use that particular coupling. If space limitations requires it, the unused coupling may be cut off. In the second place, the screw threads in the coupling are so arranged that a chisel may be inserted in the coupling to break away the wall at the bottom of the coupling and this gives two other

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possibilities, as either a waste pipe may be caulked in the socket end of the coupling, or a vent pipe of smaller diameter having screw threads may be threaded into the coupling.

Hence the piping system is flexible as either a vent pipe or a waste pipe may be connected to the main body of the fitting at any one of a number of locations. This flexibility is obtained while making it unnecessary to caulk a number of different types of main body sections together to meet a particular waste and vent requirement particularly if the toilet bend is cast integral with one of the fittings.

Preferably the special couplings are provided on opposite sides of the horizontal soil or waste pipe and on two or more sides of a vertical branch from the main soil pipe and on the main vent pipe. Preferably the closet bend is cast integral with the main vent pipe although for installations having a concrete floor it may be cast integral with the horizontal soil pipe.

The invention may be used for multi-story buildings by extending only two plain pipes between floors, for the back vent and the combination vent and waste pipe, the universal fitting for the latter being used on upper floors.

Experience indicates that for an average five-room one story house, the special fittings of this invention will save about two days of labor in installing the plumbing.

For further details of the invention, reference may be made to the drawings wherein Fig. 1 is a schematic illustration of a plumbing system having a waste line and a vent pipe each embodying the features of the present invention.

Fig. 2 is an enlarged view of a vertical branch on the waste line of Fig. 1, showing a number of adapters or couplings according to the present invention.

Fig. 3 is a schematic view of a modified form of waste line and vent pipe each having a number of adapters or couplings according to the present invention.

Referring in detail to the drawings, the plumbing system 1 in Fig. 1 is suitable for use in a dwelling or other building where there is a clearance such as about 29 inches below the floor line indicated at 2, with the soil line 3 arranged in a ditch, while the plumbing system 4 in Fig. 3 is suitable for a building having a concrete slab about 4 inches thick below the floor line indicated at 5, with only about 10 inches of clearance from the floor line 5 to the bottom of the waste line 6, so that the waste line 6 is laid practically on top of the ground.

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According to the system shown in Fig. 1, the invention provides a vent pipe fitting 7 cast in one integral piece of cast iron and comprising an elongated upright body portion 8 terminating at its upper end in a socket 9 into which another pipe may be caulked, and terminating in its lower end in a spigot 10 to be caulked in the socket 11 on the waste line 3. Also, the one piece cast fitting 7 has a clean-out opening 12 having a closure 13, and an integral toilet bend 14, as well as an adapter or coupling 15 which branches upwardly from the body portion 8 at its lower end thereof opposite the toilet bend 14, and a lateral adapter or coupling 16 and a similar coupling not shown on the opposite side at the top of fitting 7.

The waste line 3 terminates at its discharge end in a spigot 17 to be caulked into a plain pipe section. The waste line 3 is one integral cast iron fitting and has a main body portion comprising the horizontal portion 18 and an integral upright bend 19. Extending upwardly at an angle to the vertical portion 19 is a coupling or adapter 20 and on the body portion 18 is a branch 21 and a similar branch not shown on the opposite side of the portion 18, as well as a branch 22 and a similar branch not shown on the opposite side of the portion 18. The branches like 21 and 22 are adapters or couplings like 15, 16 and 20, and similar adapters or couplings as indicated at 23 and 24 branch from the riser 25 of an angle branch 26, similar lateral adapters or couplings as indicated at 27, and a similar one on the opposite side of riser 25 as indicated at 28 in Fig. 2, also being provided. The vertical branch 25 terminates at its upper end in a socket 29 to receive the spigot 30 of a back vent 31. Some States do not require a back vent, and for that reason, as shown in Fig. 2, the bottom of socket 29 is cast with a wall 32 which can be left intact to seal off the upper end of the riser 25, or it can be cut with a chisel and broken away in the event that a pipe such as the back vent 31 is to be caulked into the socket 29.

As the couplings 27 and 28 are waste lines and discharge into riser 25 at opposite points, one thereof is prevented from discharging into the other by internal web 33 which shields the discharge of each of the couplings 27 and 28, from the other.

The lateral couplings 27 and 28 are similar to the couplings 23 and 24, except that the former have an axis at right angles to the axis of the riser 25 whereas the latter branch at an angle. Each of the special couplings provided according to the present invention are cast integral with its associated pipe section and are manufactured in the form shown at 23 in Fig. 2, wherein the wall of the branch 25 as indicated at 46 seals off the bottom of the branch 23. Branch 23 has a socket 34 of a certain diameter so that the spigot end of a pipe can be caulked into it, and the branch 23 has an intermediate portion of a smaller diameter between the socket 34 and the bottom 46, as indicated at 35. The portion 35 of intermediate diameter is tapped to provide screw threads 36, for only a portion of its length, leaving an unthreaded portion 37 between the inner end 38 of the screw threads and the bottom 46 of the branch. The various choices initially described are made possible by this construction. If the plumbing requirements of a particular dwelling do not require the use of a particular coupling such as coupling 23, although

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the same applies, of course, to any of the other special couplings above described, the pipe wall portion 46 which forms the bottom of the coupling 23 is left intact. If coupling 23 is not used or if a coupling like 21 or 22 are not used, with the fitting arranged close to a wall or the like with insufficient room for such unused fitting, it may be removed by cutting with a chisel, outside of wall 46 as indicated by the broken line 47 in Fig. 2, and by giving the coupling a sharp blow to break it off. If a particular coupling like 23 is used, a chisel is inserted into the coupling to cut around the periphery of the bottom 46 whereby it may be broken out and removed. The unthreaded portion 37 permits the insertion of a chisel into cutting relation with the bottom 46 close to the side wall of the coupling, without damaging the threads 36. After the bottom 46 is removed, a pipe as indicated by 48, having threads 49, may be threaded into the coupling, here illustrated as applied to coupling 24 with its bottom wall broken away as indicated at 50. Or if the requirement is for a pipe of a larger diameter, such pipe may be caulked into the socket end of the coupling as indicated in Fig. 1 wherein the spigot end 51 of a pipe 52 is caulked into the socket 53.

From Fig. 1, it is apparent that the vent 7 with its integral toilet bend 14 requires only one caulk, at socket 11, to the waste line 3. In the example shown, the trap 60 from a wash basin is piped into the coupling 15 with either a caulk connection like that shown at 54, or a screw thread connection like that shown at 49. The wash basin line 60 has a back vent connection 61 to the back vent 31 connected at its upper end by either caulk or screw thread to the coupling 16. The pipe 52 may, for example, handle the waste from a kitchen sink and coupling 21 or 22 or a similar one on the opposite side of a main body 18 may be connected to a laundry tray not shown. Also, in the example shown, coupling 23 is not used, while pipe 48 may receive waste from a bath tub or shower or pipe 62 may receive waste from a wash tub or the like. Additional plumbing, either on the same side of vent 7 or at any point around it, may be handled by couplings like 21 and 22 also 16 and a similar one behind it. Also, the fittings 3 and 7 in Fig. 1 may be used for multi-story buildings, by caulking a required number of plain pipe sections above socket 9 and by caulking another vent fitting like 7 at the proper level to that line, and by extending the back vent 31 up to the required floor.

For buildings having greater plumbing requirements, additional branches like 26 and additional couplings like 20, 21, 22 may be provided at various positions and angles with respect to the waste line 3. Also, additional couplings like 15 and 16 may be provided at other locations and angles on the vent 7. However, the couplings shown in Fig. 1 are sufficient for the average five or six room, one-story dwelling.

By way of example, the hubs such as 29 and 34 in Fig. 2 may be 3 inches in diameter, the threaded portion like 36 may have a length of an inch and a half and a diameter of 2 inches, and the diameter of the vent 7, toilet bend 14, and vent 3 may be 4 inches, and the soil pipe like 52 may be 2 3/4 inches in diameter with a 13 inch rise from the bottom of spigot 10 to the top 63 of the toilet bend 14. Other dimensions may be used.

In the system shown in Fig. 3, the invention provides a one piece cast iron waste line 6 and a one piece cast iron vent 64. The waste line 6 has

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cast integral therewith a number of branches 65, 66 and similar ones on the opposite side of the waste line, like the branches 21, 22 in Fig. 2, as well as a vertical double Y branch 67 like the branch 26 shown in Fig. 2. Also, the waste line 6 has a short vertical hub 68 which terminates below the concrete slab 76, for the spigot 69 of the vent 64. Also, waste line 6 has cast integral therewith the toilet bend 70. The required distance of the spigot opening 71 on the toilet bend 70 from the vent 64 is obtained by casting the lower end of vent 64 with an angular offset as indicated at 72. The vent 64 is cast with an integral clean-out opening 73 and with a plurality of couplings 74, 75 extending from opposite sides of its upper end. All of the couplings indicated at the upper portion of the double Y branch 67 and the branch couplings 65, 66, 74, and 75 are all similar to the special adapters and couplings previously described.

Fig. 3 is similar to Fig. 2 in obtaining flexibility through the use of special couplings or adapters and also the use of requiring only a single caulk, between spigot 69 and hub 68 in Fig. 3, to obtain the vent pipe, waste line and toilet bend connected. By the use of the various special couplings shown in Fig. 3, various arrangements of vent and waste pipes may be connected to the vent pipe 64 and the waste line 6 as required.

In addition to the modifications above de-

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scribed, various other modifications may be made in the invention without departing from the spirit of the following claim. For example, while the couplings like 15 and 20 to 24 are indicated as extending at an angle of 45 degrees, various other angles may be used.

I claim:

A pipe fitting having a body portion having an integral cylindrical wall concentric with the axis of the pipe, a branch coupling casting integral with said body portion, a portion of said concentric wall removably sealing the inner end of said coupling from said body portion.

JOSEPH W. BOULDIN.

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1,701,691	Mueller et al.	Feb. 12, 1929

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Number	Country	Date
21,131	Great Britain	of 1912

APPENDIX AND BRIEF FOR APPELLEE

United States Court of Appeals *United States Court of Appeals*
For the
FOR THE DISTRICT OF COLUMBIA CIRCUIT *District of Columbia Circuit*

FILED

NOV 13 1957

APPEAL NO. 13,904

JOSEPH C. BECHTOLD, APPELLANT

v.

ROBERT C. WATSON, COMMISSIONER OF PATENTS,
APPELLEE

Joseph W. Stewart
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APPEAL FROM THE JUDGMENT OF THE UNITED STATES
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APPEAL NO. 13,904

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee, the questions presented on this appeal are:

1. Whether there was a rational basis for the decision of the District Court that on the evidence before it appellant's patent application *claims* set forth no material variation over each of the disclosures of the patents to Kimche No. 853,413 and Bouldin No. 2,499,900?

2. Whether there was a rational basis in the evidence before it for the District Court's refusal to authorize the Commissioner of Patents to issue a patent with claims 1 through 4 of appellant's patent application at bar?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPEAL NO. 13,904

JOSEPH C. BECHTOLD, APPELLANT

v.

ROBERT C. WATSON, COMMISSIONER OF PATENTS,
APPELLEE

*APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

INTRODUCTION

This is an appeal from the judgment of the United States District Court for the District of Columbia dismissing the complaint (Appellant's Appendix 1) in an action brought under 35 U. S. C. 145. In that action appellant, as the applicant in an application for patent entitled "Soil Pipe Plumbing Fitting," Serial No. 257,819, filed November 23, 1951, sought to have that Court authorize the issuance to him of a patent containing claims 1 through 4 (Appellant's Appendix 2 and 3).

The District Court concurred with the Patent Office examiner (Appellee's Appendix 31) and the Patent Office Board of Appeals (Appellee's Appendix 35) in their refusal of claims 1 through 4 as unpatentable

over prior art (Appellant's Appendix, Findings of Fact Nos. 9 and 11).

APPELLANT'S APPLICATION

Figs. 1 and 3 of the application drawing (Appellee's Appendix 28) illustrate the problem which is solved by appellant's disclosure. In a house built without a basement on a concrete slab 5, a bathroom fixture, such as a bathtub 6, is connected through a P-trap 12 to a soil pipe 20 which is vented through the slab to pipe 22. Where these elements are connected by using a conventional tee 25 (Fig 3), the connection from the tee to the vent pipe 20 is supplied by cutting a standard pipe to provide the section 29 through the slab and by caulking a joint between section 29 and the tee. Appellant-applicant's improvement resides in a special fitting in which the tee 25 and section 29 are in one piece, as in Fig. 2 or Fig. 4.

THE PRIOR ART

The 1907 patent to Kimche No. 853,413 (Appellant's Appendix 21) discloses two modifications of what is specifically designated a tee fitting (Appellant's Appendix 23, lines 18 and 19). Kimche's Fig. 1 discloses a horizontal section B, a lower vertical section G, and an upper vertical section A *extending through a floor*. Fig. 4 discloses similar vertical sections G and A and a horizontal section I adapted to be connected to a water closet and also adapted to be connected to a P trap, although such latter use of the structure is not disclosed.

The 1950 patent to Bouldin No. 2,499,900 (Appellant's Appendix 25) discloses in Fig. 1 a tee portion comprising a lower vertical section 10, an upper vertical section 8 extending *above floor line 2*, and a horizontal section 14 to which is integrally joined a bend terminating at 63.

STATUTES INVOLVED

35 U. S. C. 102. Conditions for Patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

* * * * *

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

* * * * *

35 U. S. C. 112. Specification

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claim-

ing the subject matter which the applicant regards as his invention. * * *

35 U. S. C. 113. Drawings

When the nature of the case admits, the applicant shall furnish a drawing.

35 U. S. C. 145. Civil action to obtain patent

An applicant dissatisfied with the decision of the Board of Appeals may, unless appeal has been taken to the United States Court of Customs and Patent Appeals, have remedy by civil action against the Commissioner in the United States District Court for the District of Columbia if commenced within such time after such decision, not less than sixty days, as the Commissioner appoints. The court may adjudge that such applicant is entitled to receive a patent for his invention, as specified in any of his claims involved in the decision of the Board of Appeals, as the facts in the case may appear and such adjudication shall authorize the Commissioner to issue such patent on compliance with the requirements of law. All the expenses of the proceedings shall be paid by the applicant.

Sec. 4888. (U. S. C., title 35, sec. 33.)

Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science

to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. * * *

Sec. 4889. (U. S. C., title 35, sec. 34.)

When the nature of the case admits of drawings, the applicant shall furnish one copy signed by the inventor or his attorney in fact, which shall be filed in the Patent Office; and a copy of the drawings to be furnished by the Patent Office, shall be attached to the patent as a part of the specification.

SUMMARY OF ARGUMENT

1. In the light of all the evidence the claims, as hereinafter analyzed, set forth no significant distinction over each of the patents to Kimche No. 853,413 and Bouldin No. 2,499,900.

2. Since the application on its face indicates that appellant's development consists merely in casting in one piece what was previously two, the District Court's refusal to authorize patenting had a rational basis despite the testimony at the trial and without reliance on the cited patents.

3. There is no reversible error in the decision of the District Court.

ARGUMENT

Appellant in Question 1 of his Statement of Questions Presented and in the last paragraph of his brief (page 12) directs attention to his *claimed* fitting, contending that the claims recite material variations over the reference patents and that the reference patents do not teach the *claimed* invention. The basic question before the Court obviously is not whether appellant's application *discloses* an invention but rather whether in the light of all the evidence appellant's *claims* set forth the essential substance of what is so *clearly* an invention that there is reversible error in the decision of the trial court. 35 U. S. C. 112, paragraph 2; 35 U. S. C. 103; *Abbott v. Coe*, 71 App. D. C. 195, 109 F. 2d 449. Moreover, appellant's evidence presented to the trial court is material to the issue of patentability only insofar as it is relevant to the substance of the claims.

Appellant adduced the testimony of three witnesses, all of whom are plumbing contractors and at least one of whom is a master plumber. Each of these witnesses testified either that the appellant's development would not have been obvious to him in view of the prior art of Fig. 3 of appellant's application, as admitted in the specification and in the testimony, or that the appellant's development would not have been obvious to him or suggested to him had he known the reference patents. (Appellee's Appendix 36.) None of this testimony was related to the specific substance of the claims as distinguished from what each witness considered the invention to be. What is more impor-

tant, the testimony of the witness Stutz (Appellee's Appendix 37) clearly indicates that he considers designers of plumbing equipment to be the persons of ordinary skill in the art and that he does not consider plumbing contractors or plumbers to be persons of at least ordinary skill in the art to which appellant's claims pertain. Accordingly, the opinion and conclusion testimony of none of the witnesses is of any value in considering the patentable significance of the limitations of the claims.

Each of the claims at least sets forth a fitting having a lower vertical section, an intermediate horizontal section, and an upper vertical section long enough to extend through and above a floor located above the intermediate horizontal section. Such structure is the only material part of applicant's disclosure and is fully anticipated by the 1907 patent to Kimche No. 853,413 (Appellant's Appendix 21-24, Figs. 1 and 3, elements F, G, B, and I, and specification lines 19, 20, 25 through 50, 57, and 67 through 83) and also by the 1950 patent to Bouldin No. 2,499,900 (Appellant's Appendix 25-33, Fig. 1, elements 2, 8, 10, and 14, and specification, column 1, lines 2, 18, 19, 24, and 27; column 2, lines 9 through 11, 22, 23, 29, 30, 47, 48, 51, 52; and column 4, lines 28 through 30).

Appellant in his brief (page 3, last paragraph) contends that the reference patents "do not disclose tee fittings." He defines a tee fitting (brief, page 5) as a fitting which "consists of integral aligned upper and lower pipe sections with a *shorter* pipe section extending laterally therefrom" (emphasis added).

The emphasized limitation is appellant's own arbitrary limitation and is not found in Webster's New International Dictionary, Second Edition, unabridged, where the definitions of the noun "tee" include the following:

"1. The letter T, t.

"2. Anything having the shape of the letter T (see T); specif.: *a* a *short* piece of pipe having a lateral outlet, used to connect a line of pipe with a pipe at a right angle with the line, * * *'" (emphasis added).

Appellant in his brief also states (page 7): "The laterally extending toilet bends of these references does not make the fittings tees." This statement is interpreted as suggesting that in Kimche and Bouldin the disclosed laterally extending toilet bends cause the structures of those patents to be something other than tees. However, Kimche, at page 1 of his patent, lines 18 and 19 (Appellant's Appendix 23), specifically states that his "invention consists in the peculiar constructions of a tee * * * fitting." Thus, as long ago as 1907, a patentee in the art to which appellant's disclosure is related designated as tee fittings his disclosed structures each of which includes a tee portion and additional integral pipe structure.

As to the claims, the first question to be considered is whether or not their terms exclude horizontal sections having extensions such as the integral elbows of the patents. In this respect, claim 2 (Appellant's Appendix, 2 and 3) is most specific. In view of the above discussion of the meaning of the term "tee

fitting", it is submitted that this term in this claim, as distinguished from broader terms like "fitting of the tee type" (as used in claim 1) or "tee type fitting" (as used in claims 3 and 4), does not *per se* exclude either as noninfringing or as nonanticipating a structure including the integral elbow C of the Kimche patent or a structure including the elbow integral with the element 14 of the Bouldin patent. Furthermore, the use (in all of the claims) of the term "comprising" rather than the term "consisting of" also leaves claim 2 open to both infringement and anticipation by structures including the above-indicated integral elbows of the reference patents. It is well settled that the use of "comprising" leaves a claim open to read on and not exclude substance not specifically recited in the claim. *In re Gray*, 19 CCPA 745, 53 F. 2d 520; *In re Cone*, 28 CCPA 1282, 121 F. 2d 470; *In re Bertsch*, 30 CCPA 813, 132 F. 2d 1014; *In re Lincoln and Hendriksen*, 32 CCPA 1213, 150 F. 2d 576; *In re Herwitz*, 35 CCPA 1239, 168 F. 2d 522. Claim 2, however, also limits the horizontal section to structure "to which a 'P' trap is connectable." This limitation does not require that such trap be *directly* connectable to the horizontal section or that it be connectable to the horizontal section *below* the floor or slab. Thus, in Bouldin's Fig. 1, a P-trap, such as element 60, could be *indirectly connected* to the elbow end 63 *above* the floor line 2 in the same manner as P-trap 60 is shown connected to element 15 of the same figure. Thus, there is nothing in all the terminology of ap-

pellant's claim 2 to limit the claimed structure to a fitting in which the horizontal section has no other structural elements integral therewith. Consequently, in that respect, claim 2 and the other claims fail to distinguish either from Bouldin's member 14 or from Kimche's member B.

Moreover, Kimche's Fig. 4 discloses a tee consisting of elements A, G, and I. There the member I is clearly and inherently a horizontal member to which a P-trap could not only be connected, but directly connected under the slab. (Appellant's testimony [Appellee's Appendix 37] stating broadly that it would be impossible "to connect up to the Kimche reference a bathtub having an underground P trap" is obviously inaccurate.) As previously pointed out, Kimche, at lines 18 and 19 of his specification, identifies his "constructions" by the term "tee * * * fitting" even though in Fig. 4 the structure has two horizontal arms (whose purpose is described in the specification, Appellant's Appendix 23, lines 72 through 75). There is nothing in the terminology of any of appellant's claims to limit them only to the above-indicated tee portion of Kimche's Fig. 4 and to exclude a second horizontal arm B having an integral elbow as in that Fig. 4.

Claim 2 and the other claims, therefore, clearly do not distinguish from the reference patents in any limitations above discussed.

All the claims specify that the upper vertical section is "approximately three times" the length of the lower vertical section. This limitation of proportion

is not disclosed in either appellant's specification or any claim as originally filed. It is well settled that a feature relied on for patentability of the alleged invention must be disclosed in the specification pursuant to both the old statute (R. S. Sec. 4888, 35 U. S. C. 33) and the 1952 Act (35 U. S. C. 112). The furnishing of the drawing in compliance with either the old statute (R. S. 4889, 35 U. S. C. 34) or the 1952 Act (35 U. S. C. 113) is not a substitute for the required specification description. *Tinker v. Wilber*, 1 Fed. 139; *Gunn v. Savage*, 30 Fed. 366; *Windle v. Parks & Woolson Mach. Co.*, 134 Fed. 381 (CCA 2); *Permutit Co. v. Graver Corp.*, 284 U. S. 52; *Typewriters Hilliardized, Inc. v. Corona Typewriter Co.*, 43 F. 2d 961 (CCA 2); *American Steel Foundries et al. v. Sutton-Gallagher Iron & Steel Co.*, 197 Fed. 49 (CCA 8); *Wolff-Trunk Frame Co. v. American Steel Foundries*, 195 Fed. 940, 945 (CCA 7); *Thompson v. Dicke*, 27 CCPA 931, 110 F. 2d 98. Patent application drawings are not required to be to scale. *Ex parte Turner*, 101 O. G. 2078, 1902 C. D. 429. It follows that they cannot be relied on as a sole disclosure of dimensions or proportions. *Crown Cork & Seal Co. v. Aluminum Stopper Co.*, 108 F. 845, 849 (CCA 4); *Bullock Electric Mfg. Co. v. General Electric Co.*, 149 Fed. 409 (CCA 6); *In re Finley*, 22 CCPA 1090, 76 F. 2d 306; *In re Nash*, 43 CCPA 827, 230 F. 2d 428. In this instance, the drawings also do not support the limitation since they show the upper vertical section four rather than three times as large as the lower vertical section. Moreover, the witness

Holbrook (Appellee's Appendix 35) testified that appellant's fitting, as he knows it in at least one form, has an upper section 12 inches long and a lower section 6 inches long, which, of course, would make the upper section only two times as long as the lower. Not only is the "three times" limitation not supported by any disclosure in the application as filed, but, in view of the above-indicated aspects of the record, it can only be arbitrary. While the upper section must undoubtedly be long, there is no significance shown for any definite proportionate length of the lower vertical section. Accordingly, for all the above reasons, the limitation can have no effect on the patentability of the claims.

All the claims specify that the horizontal section of the tee is shorter or of lesser length than the lower vertical section. Neither the written description in the specification nor the original claims support this limitation. Consequently, on the basis of the principles of law stated in the decisions cited in the preceding paragraph, this limitation also is patentably ineffective even though such relative dimensions are shown in Fig. 4 of appellant's application. Moreover, no significance of this limitation has been shown either in the application or by testimony. The specification describes element 37 in Fig. 4 only as "interiorly threaded." For the provision of such threading, it is immaterial whether the horizontal section is short or long.

All the limitations previously discussed clearly cannot be the basis for patentability over the reference

patents. There remains for consideration only the limitation in claims 1 and 2 that the length of the upper vertical section must be sufficient so that it will extend through or above the floor or slab when the horizontal section is approximately six inches below the floor or slab. Where the floor slab is four inches thick, as described in appellant's specification, the upper vertical section must correspondingly be at least ten inches long, as set forth in claim 4. That neither the 6 inch nor 10 inch dimension is material or critical is indicated by appellant's specification, which, in the third paragraph from the end, states that the horizontal section of the tee is "*generally* in the neighborhood of *five* to six inches below the slab * * *, while the thickness of the slab is generally *about* four inches." It follows that, according to the specification, the horizontal section might be five inches below the slab and the total length of the vertical section might be less than 10 inches. That the 10 inch limitation is not significant *per se* is further shown by Holbrook's testimony (Appellee's Appendix 35) that this dimension is "about 12 inches." Given the principle of bringing the top of the vertical section above the floor line, as disclosed in each of the Kimche and Bouldin patents, the exact dimensions of the upper vertical pipe section, as well as the proportionate lengths of any of the sections, are not material features, but are matters of design and choice depending on the fixed conditions of the problem to be solved, namely, conditions such as the thickness of the floor and the distance below the floor at which it is most

convenient to locate the horizontal section of the tee. As to these limitations of dimension, appellant has adduced *no evidence* to establish that the limitations of dimension in his claims are material or significant rather than mere matters of design or choice.

Accordingly, it is submitted that the examiner, the Board of Appeals, and the District Court correctly held that the reference patents disclose the material concept of providing a one-piece fitting, including a tee portion, adapted to extend through or above a building floor, and that "there is no invention in changing the size or proportion of the device or machine so long as the construction and mode of operation remain the same." *In re Williams*, 17 CCPA 718, 36 F. 2d 436.

The significance of some of the limitations in appellant's claims in relation to the prior art can be analyzed also in another manner. Those limitations which do not appear in all the claims cannot be considered critical, material, or significant. *In re Ripper*, 36 CCPA 743, 171 F. 2d 297; *In re Fear*, 30 CCPA 1197, 136 F. 2d 908 (seventh paragraph from the end of the decision).

Accordingly, the following limitations cannot be considered material:

"tee fitting" (not in claims 1, 3, and 4); "to which a P trap is connectable" (not in claim 1); "over ten inches" (not in claims 1 and 3); "for use under a concrete slab approximately four inches thick" (not in claim 1); and "for interconnecting a trap" (not in claim 1).

Moreover, the last two of the above limitations are merely statements of use having no structural significance. It is well settled that such statements of use do not impart patentability to an old structure. See Table A in the appendix to *Kropa v. Robie*, 38 CCPA 858, 187 F. 2d 150.

Another aspect of lack of invention over the cited patents may be analyzed as follows. It is well settled that to omit an element of the prior art and also to omit the function of that element is not invention. *Richards v. Chase Elevator Co.*, 159 U. S. 447, 486; *General Electric Co. v. Minneapolis-Honeywell Regulator Co.* (CCA 2), 118 F. 2d 278; *Utah Radio Products Co. v. General Motors Corp.* (CCA 2), 106 F. 2d 5; *White Dental Mfg. Co. v. J. A. Fischer Co., Inc.* (CCA 2), 100 F. 2d 389; *O'Leary v. Liggett Drug Co.* (CCA 6), 150 F. 2d 656; *Grayson Heat Control Ltd. v. Los Angeles Gas Appliance Co., Inc.* (CCA 9), 134 F. 2d 478; *In re Lister*, 30 CCPA 481, 136 F. 2d 719; *In re Meade*, 31 CCPA 930, 141 F. 2d 135. Accordingly, considering Kimche, Fig. 4, and assuming *arguendo* that claim 2 excludes the arm B of that figure, there would be no invention in eliminating both that arm and its function to leave only elements A, G, and I, which elements constitute the essential structure of all the appellant's claims. Similarly, in Bouldin's Fig. 1 and in Kimche's Fig. 1, no invention would be involved in eliminating both the structure and the function of all elements in excess of the structure positively set forth in any of appellant's claims. Appellant has adduced no testimony by persons of at

least ordinary skill in the art to which appellant's claims pertain which would show that these last analyses of lack of invention are wrong.

However, it should be noted that even if there had been adduced testimony competent to establish that any dimension of the claims was critical, in the absence of disclosure of such criticality in the specification that evidence would be immaterial. *Abbott v. Coe*, 71 App. D. C. 195, 109 F. 2d 449.

Moreover, in the absence of unusual factors such as those enumerated in *Krementz v. S. Cottle Company*, 148 U. S. 556, it has been held that there is no invention in making two separate parts integral. *Welsh Mfg. Co. v. Sunware Products Co.* (CCA 2), 236 F. 2d 225; *In re Lockhart*, 38 CCPA 1195, 190 F. 2d 208. In *Howard v. Detroit Stove Works*, 150 U. S. 164, 174, the Supreme Court held that there was no invention in casting two formerly separate parts as one. That is exactly what appellant has done. Accordingly, if in the absence of any testimony by persons having at least ordinary skill in the art, the District Court in the trial of this action had found that no invention was involved in making integral the two parts of the admitted prior art (illustrated in Fig. 3 of appellant's application, Appellee's Appendix 28), it is submitted that such finding would have had a rational basis on the record before this Court and would not have involved reversible error. If the ruling of the trial court was correct, it is immaterial what reason is stated. *McMahon v. Matthews*, 48 App. D. C. 303; *Levin v. Coe*, 76 U. S. App. D. C. 347, 132 F. 2d 589.

Rule 17 (c) (11) of this Court requires that appellant shall print in the appendix to his brief such parts of the record relevant to the questions presented as the appellant desires the Court to read. While appellant has alluded in his brief to portions of the transcript of the testimony which is part of the record on appeal, he has printed no testimony in his appendix. Accordingly, it may be fairly presumed that he considers the testimony alluded to in the brief as being of so little value that he does not desire the Court to read it.

None of appellant's witnesses testified as to the significance of substance set forth in any specific limitations *in the claims* for the purpose of establishing patentable *distinction* over the references in those limitations. Appellant (Appellant's Appendix 14 and 15) suggests "long felt need." However, in paraphrase of the language in *Welsh Mfg. Co. v. Sunware Products Co., supra*, it is noted that here there is no evidence that there had been any sustained effort over a period of time to find a way of solving the problem confronting the appellant. Since appellant's own testimony indicates that he solved the problem stated in his patent application immediately upon being confronted with it (Appellee's Appendix 36), it might be said in the words of appellant's counsel (Appellant's Appendix 11, first paragraph) that "the instantaneous solution of a problem suggests that there was not a problem in the first place." This is clearly a case in which the evidence of commercial success of appellant's product cannot overcome plain absence of

invention. *Union Metal Mfg. Co. et al. v. Ooms*, 81 U. S. App. D. C. 76, 154 F. 2d 857.

Appellant has failed to demonstrate any reversible error such as was found in the decision of the trial court in each of the cases of *Levin v. Coe, supra*; *Broderson v. Marzall*, 90 U. S. App. D. C. 78, 194 F. 2d 138; *Poulsen et al. v. Coe*, 73 App. D. C. 324, 119 F. 2d 188; and *L-Q-F Glass Fibers Co. v. Watson*, 97 U. S. App. D. C. 69, 228 F. 2d 40. Accordingly, the judgment of the District Court in this action should be affirmed. *Abbott v. Coe, supra*; *Esso Standard Oil Co. v. Sun Oil Co.*, 97 U. S. App. D. C. 154, 229 F. 2d 37; *Dyer v. Coe*, 75 App. D. C. 125, 125 F. 2d 192.

CONCLUSION

All the claims on appeal, it is submitted, were properly refused to appellant on the ground that they define no invention over the prior art. Accordingly, it is further submitted that the judgment appealed from was correct and should be affirmed.

Respectfully submitted,

CLARENCE W. MOORE,
Solicitor,
United States Patent Office,
Attorney for Appellee.

GEORGE C. ROEMING,
Of Counsel.

NOVEMBER 1957.

APPELLEE'S APPENDIX

ALPHABETICALLY

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EXCERPTS FROM APPELLANT'S APPLICATION, AS FILED
SPECIFICATION

To all whom it may concern:

Be it known that I, JOSEPH C. BECHTOLD, a citizen of the United States and a resident of the City of Newport Beach, in the County of Orange, and State of California, have invented a new and useful improvement in SOIL PIPE PLUMBING FITTING, of which the following is a specification:

This invention relates to plumbing devices, and particularly to sanitary and tapped tee fittings used in drains from bathtubs, showers, and similar fixtures.

In many present day home or house constructions, a concrete slab is first laid, on which the building is erected. To provide for the various connections to the plumbing fixtures, boxes or spaces are provided at predetermined positions in the slab. However, the ground or soil pipes must be laid in or on the ground before the slab is poured with the ends extending above the level of the upper surface of the slab. Waste drains from bathtubs and showers require traps and vents, and these must be installed below the floor, and consequently, below the slab before it is poured. The fittings heretofore used for connecting to "P" traps, soil pipes, and vent pipes were of such dimensions and shapes as to require the caulking thereto of an extra piece of pipe to each fitting in

order to extend the vent openings or connections above the surface of the concrete slab and to which vent pipes could be connected. This required additional time and also certain materials, such as lead and oakum. The present invention avoids the time required for cutting the extra piece of pipe and for making this extra joint, and of course, the material used in the joint.

The principal object of the invention, therefore, is to facilitate the installation of soil fittings.

Another object of the invention is to provide an improved sanitary or tapped tee fitting.

A further object of the invention is to provide a tee soil fitting which requires no additional joints or time required for installation beyond that required for the original type of fitting.

Although the novel features which are believed to be characteristic of this invention will be pointed out with particularity in the appended claims, the manner of its organization and the mode of its operation will be better understood by referring to the following description, read in conjunction with the accompanying drawings, forming a part hereof, in which:

Fig. 1 is an elevational view of the invention being used in connection with a bathtub drain.

Fig. 2 is an enlarged view of the fitting shown in Fig. 1.

Fig. 3 is a view of an old form of fitting which is replaced by the invention, and

Fig. 4 is a view of a modification of the fitting shown in Fig. 2.

Referring now to the drawings, in which the same numerals identify like elements, the usual type of concrete slab on which a house is built is shown at 5, and on which is positioned a bathtub 6. When the slab is poured, a box or opening is provided at 7, in which the main drain connection 8 and connecting tee 9 are eventually accommodated, an overflow pipe 10 connecting with the tee 9. A "P" trap 12 is shown connected to pipe 13 at caulked joint 14, the pipe 13 being connected to tee 9.

The other end of "P" trap 12 is connected to a horizontal section 17 of a fitting 18 embodying the invention. This connection is made by caulked joint 15. The fitting 18 has a lower section 19 coupled to a soil pipe section 20, which goes to the sewer, and it also has an upper section 21 to which is joined a vent pipe 22 after the slab 5 is laid and the tub 6 is installed. Before the slab 5 is poured, the trap 12 and fitting 18 are installed and connected to pipe 20, the ends of the respective fittings being plugged until the final connections to the tub 6 and vent pipe 22 can be made. This also applies to other plumbing fixtures to be used in the house.

Before the invention, the fitting used at 18 was in the form shown at 25 in Fig. 3. That is, the fitting 25 had a horizontal section 26, a lower section 27, and an upper section 28. To use this fitting 25, it was necessary for the plumber to join to the upper section 28, a pipe section 29, to extend the vent connection point above the slab 30. As mentioned above, this required the cutting of an extra piece of pipe, the caulk-

ing of the joint 32, which required approximately twenty minutes' time, and the use of extra materials such as about two pounds of lead and one-fourth of a pound of oakum. The soil pipes are of cast iron, while the vent pipe 22 is of brass or galvanized iron. The horizontal section 17 or 26 was generally in the neighborhood of five to six inches below the slab 5 or 30, while the thickness of the slab is generally about four inches.

By the use of applicant's invention 18, the only joints to be made are those at 15 and 33, while, in the prior connections, the additional joint 32 had to be made also. What applicant has conceived, therefore, is a high top tap or sanitary tee, which saves cutting an extra piece of pipe and saves the time required for caulking an extra joint plus the materials used in the extra joint.

The tee 18 has been shown with terminations requiring all caulked joints, and which is known as a sanitary tee, while the modification 36, shown in Fig. 4, with sections 37, 38, and 39 in slab 40, has the section 37 interiorly threaded for installations in which a screw thread connection may be made with the trap. This is known as a tapped tee, and City ordinances generally determine the type of tee to be used. It is to be understood that the diameters of the different sections 17, 19, and 21 may vary in accordance with the plumbing code, such as a 2" x 2" x 2" tapped or sanitary tee or a 2" x 2" x 1½" tapped or sanitary tee.

I claim:

Claim 1. A plumbing fitting of the tee type comprising a lower section of sufficient length to couple to a soil pipe, an intermediate section at right angles to said lower section, and an upper section having its axis coincident with the axis of said lower section and of sufficient length to extend through the floor of a house when said intermediate section is approximately six inches below said floor.

Claim 2. A tee fitting for use under a concrete slab of approximately four inches thick comprising a tee having a section to which a "P" trap is connectable, a lower section at right angles to said first mentioned section and adapted to be connected to a soil pipe, and an upper section having its axis coincident with the axis of said lower section and of sufficient length to extend above the surface of said concrete slab when said first mentioned section is approximately six inches below said slab.

Claim 3. A tee type fitting for interconnecting a trap, a soil pipe, and a vent pipe, and for use under and through a floor comprising a horizontal section adapted to be connected to said trap, a lower vertical section adapted to be connected to said soil pipe, and an upper vertical section adapted to be connected to a vent pipe, said connection to said vent pipe being above said floor.

Claim 4. A tee type fitting in accordance with Claim 3, in which the length of said upper vertical section is over ten inches.

APPELLANT'S APPLICATION DRAWING AS FILED

282
205 Durkin

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FIG. 1.

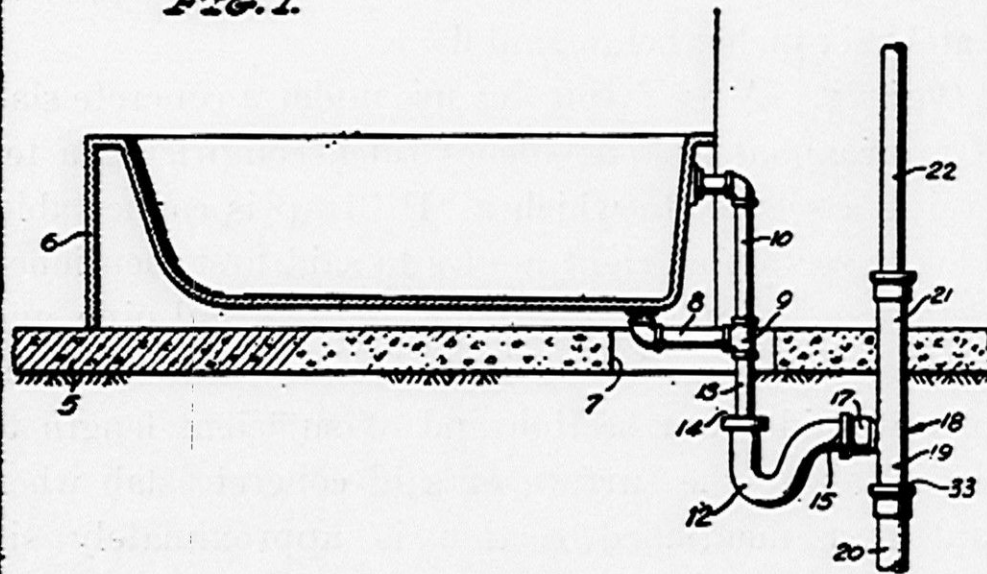


FIG. 2.

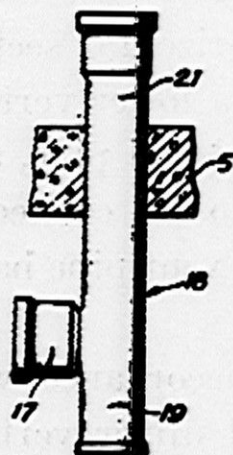


FIG. 3.

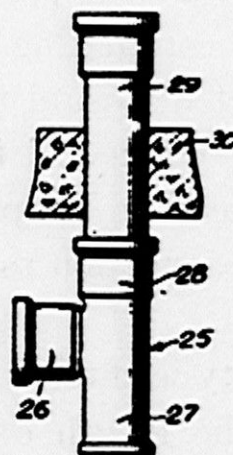
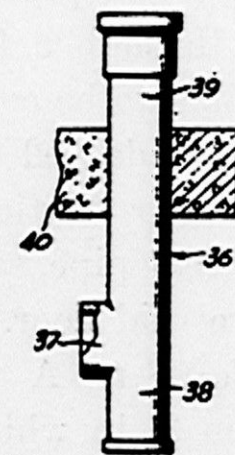


FIG. 4.



INVENTOR.
JOSEPH C. BECHTOLD,

BY *W. R. Lockhart*

ATTORNEY

EXAMINER'S ANSWER ON APPEAL TO BOARD OF APPEALS

Paper No. 8

(Mailed Nov. 13, 1953. PAT. DIV. 57)

DEPARTMENT OF COMMERCE

UNITED STATES PATENT OFFICE

WASHINGTON

Appeal No. 38610

In re application of Joseph C. Bechtold

Ser. No. 257,819

Filed Nov. 23, 1951

For Soil Pipe Plumbing Fitting

Before the Board of Appeals

Irl R. Goshaw, attorney for appellant

EXAMINER'S ANSWER

This is an appeal from the final rejection of claims 1-4, inclusive, these being all of the claims in the application.

A correct copy of the appealed claims appears on pages 1 and 2 of applicant's brief.

References Relied on

The references relied on are:

Kimiche.....	853,413	May 14, 1907
Bouldin.....	2,499,900	Mar. 7, 1950

Description of Invention

The invention relates to a soil pipe T-fitting of the bell and spigot type. The conventional T-fitting is shown at 25 in Fig. 3 and comprises a vertical section 27 having bell 28, and a lateral horizontal port 26. Apparently, the only difference between this conventional fitting and the instant fitting is one of dimension. Applicant's fitting simply has the upper end of the vertical section extended further than is the case with the conventional fitting. More specifically, the upper end of the vertical section is more than ten inches from the lateral section 37.

The purpose of making the fitting in this manner is to eliminate the joint 28 (Fig. 3). Applicant's fitting is shown in Figs. 1, 2, and 4.

Description of the references

Kimiche shows a T-type soil pipe fitting of the bell and spigot type having a vertical extension A and a lateral extension B and with the vertical section above the lateral extension extending through a building floor.

Bouldin shows a T-type soil pipe fitting of the bell and spigot type having a vertical extension 8 and a lateral extension 14, with the portion of the vertical extension 8 above the lateral extension 14 extending through a building floor, represented by line 2.

Application of References to Claims

Claims 1-4, inclusive, are under final rejection as being obviously unpatentable over Kimiche, or Bouldin. It would obviously be devoid of invention to extend or shorten the upper vertical section of either Kimiche or Bouldin, as desired. Such modification, and the provision of specific distances between the floor and specified portions of the fitting or the soil pipe line involving merely a matter of diminsioning which is in the realm of design rather than invention, and obviously requires only the exercise of mechanical skill.

Obviously, the final rejections should be sustained without exception.

ARTHUR B. MILLER, *Examiner.*

IRL R. GOSHAW
149 S. Almont Drive
Beverly Hills, Calif.

DECISION OF BOARD OF APPEALS

Paper No. 9

(Mailed April 27, 1955. U. S. Patent Office Board
of Appeals)

Appeal No. 386-10

IN THE UNITED STATES PATENT OFFICE

Before the Board of Appeals

Ex parte Joseph C. Bechtold

Application for Patent filed November 23, 1951,
Serial No. 257,819. Soil Pipe Plumbing Fitting

Irl R. Goshaw for appellant.

This is an appeal from the final rejection of claims 1 to 4, inclusive, which are all of the claims now in the case.

Claim 2 is representative and reads as follows:

2. A cast-iron soil pipe tee fitting for use under a concrete slab of approximately four inches thick comprising a tee having a horizontal section to which a "P" trap is connectable, a lower vertical section at right angles to said first mentioned section and adapted to be connected to a soil pipe, and an upper vertical section having its axis coincident with the axis of said lower section and approximately three times the length of said lower vertical section, the length of said upper vertical section being sufficient to extend above the

surface of said concrete slab when said first mentioned section is approximately six inches below said slab, said horizontal section being shorter than said lower vertical section.

References relied upon are:

Kimche-----	853,410	May 14, 1907
Bouldin-----	2,499,900	Mar. 7, 1950

This application relates to a soil pipe T-fitting of the bell and spigot type, which has been described in the Examiner's Statement as follows:

"The conventional T-fitting is shown at 25 in Fig. 3 and comprises a vertical section 27 having bell 28, and a lateral horizontal port 26. Apparently, the only difference between this conventional fitting and the instant fitting is one of dimension. Applicant's fitting simply has the upper end of the vertical section extended further than is the case with the conventional fitting. More specifically, the upper end of the vertical section is more than ten inches from the lateral section 37."

The appealed claims have been rejected as being obviously unpatentable over Kimche or Bouldin. Kimche shows a T-type soil pipe fitting of the bell and spigot type having a vertical extension A and a lateral extension B with the vertical section extending above the lateral extension and through a building floor. Bouldin discloses a T-type soil pipe fitting of the bell and spigot type having a vertical extension 8 and a lateral extension 14, with the portion of the vertical extension 8 above the lateral extension 14 extending through a building floor, represented by line 2.

It is the Examiner's opinion that it would obviously be devoid of invention to extend, or shorten, the upper vertical section of either Kimche or Bouldin, as desired, since such modification and the provision of specific distances between the floor and specified por-

tions of the fitting or soil pipe involve merely a matter of dimensioning which is in the realm of design rather than invention and obviously requires only the exercise of mechanical skill.

Appellant contends that for many years plumbers have employed the standard or short tee, shown in Fig. 3, which necessitated the extra vertical section 29 and the extra joint 28. Appellant states that this required a certain amount of time and materials to make such a joint and that his invention eliminates the joint at 28, while the additional cost of making the section 29 integral with the section 27, as shown in Fig. 3, is negligible. Appellant contends that invention is involved in making sections 25 and 29 integral because it has reduced time and material, which is important in large building projects involving many homes.

We have carefully considered appellant's argument but find no error in the Examiner's rejection of the appealed claims, since it is well settled that there is no invention in changing the size or proportion of a device or machine so long as its construction and principle of operation remains the same. *In re Williams*, 1930 C. D. 97; 36 F. (2d) 436; 392 O. G. 737. Furthermore, Kimche clearly discloses making the upper vertical section of the T-joint of sufficient length to pass through the floor and Bouldin discloses making the upper vertical section of the T-joint not only of sufficient vertical length to extend above the surface of the floor, but also long enough to make connections in the side thereof below the bell. It is our opinion that the Examiner was correct in stating that no invention would be required to extend, or shorten, the upper vertical section of either Kimche or Bouldin, as desired, in order to provide a T-type soil

pipe fitting of the proper dimensions to fit the job.
The rejection of the appealed claims will be sustained.

The decision of the Examiner is affirmed.

L. P. McCANN,
Examiner-in-Chief

B. H. CARPENTER,
Examiner-in-Chief

M. F. BAILEY,
Examiner-in-Chief (Acting)
Board of Appeals.

APRIL 27, 1955.

IRL R. GOSHAW,
149 S. Almont Drive,
Beverly Hills, Calif.

EXCERPTS FROM DEPOSITION OF WITNESS HOLBROOK

(Page 2 of deposition)

Q. What is your occupation, Mr. Holbrook? A.
Plumbing contractor.

* * * * *

(Page 3 of deposition)

Q. Do you know of any inventions that Mr. Bechtold has made?—A. Yes, the Hi-Top Tee.

Q. Please describe this Hi-Top Tee, and what it is used for.—A. It is used mainly for bathtubs and showers. It is a fitting approximately 15 to 18 inches long and about 6 inches from the bottom there is an opening for branch fittings to attach to. It has a high neck of about 12 inches.

* * * * *

(Page 7 of deposition)

Q. As a practical plumber, Mr. Holbrook, does either one of these patents taken separately or collectively suggest to you Mr. Bechtold's Hi-Top Tee?—

A. Definitely not.

Q. Will you state for the record, please, whether Mr. Bechtold's invention would have been obvious to you if you had these patents before you?—A. No, it would not have. There would not have been any resemblance there to suggest the Bechtold fitting.

EXCERPTS FROM TRANSCRIPT OF RECORD DURING TRIAL
HAD MARCH 28, 1957

TESTIMONY OF APPELLANT BECHTOLD

(Page 9 of Transcript)

A. * * * I am a plumbing contractor in the State of California.

* * * * *

Q. Are you a master plumber?—A. Yes, sir.

* * * * *

(Pages 10 and 11 of Transcript)

Q. Is it necessary or is it intended in your invention to use a P trap in connection with your tee?—A. Yes, sir, and we have always used a P trap under the slab for bathtubs, showers, or closets.

Q. Will you explain to the Court, please, how you happened to make this invention?—A. * * * When I was in this operation and I was actually cutting the last piece of pipe, it occurred to me that what is this costing me for waste. That is just exactly where I dreamed up the idea and the thought occurred to me about the fitting, why isn't it made to eliminate this joint, and the expense.

(Page 26 of Transcript)

Q. Would it be possible to connect up to the Kimche reference a bathtub having an underground P trap?—

A. No, absolutely not. It would be impossible to use it.

(Page 27 of Transcript)

Q. If you had had those two references before you at the time, or at the time that you invented your invention, would they have suggested the invention to you?—A. Absolutely not.

TESTIMONY OF WITNESS STUTZ

(Page 30 of Transcript)

* * * A. Lawrence O. Stutz, plumbing contractor, 45 years of age.

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Q. Would it have occurred to you as a practical plumber that it would be desirable to have a different type of tee to make the upper section of the sanitary tee integral with the pipe?—A. No, sir, because we are just installers of the threadings and the equipment, sir, and we are not designers of plumbing equipment.